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The U.S. Commission on Civil Rights acquired and analyzed information relating to school desegregation in the Southern and border States during the 1966-67 school year. Data were obtained by the Commission primarily from field investigations (mostly in rural school districts) and analysis of the Department of Health, Education, and Welfare's files and operations during the school year. Results of the study showed: that the percentage of Negro children attending desegregated schools in the Southern States in 1966-67 increased substantially over the previous school year; that this progress had been acompanied in many communities by a spirit of acceptance and understanding; that more than 4/5 of the Negro children in the 11 Southern States and more than 9/10 in the 5 Deep South States still attended all-Negro schools; and that very little desegregation of full-time teachers had taken place. The Commission's recommendations showed the need for more accomplishments to secure the constitutional rights of Negro students through strengthening present requirements which the Department of Health, Education, and Welfare has disseminated under Title VI and by improving procedures by which compliance is monitored. (CM)

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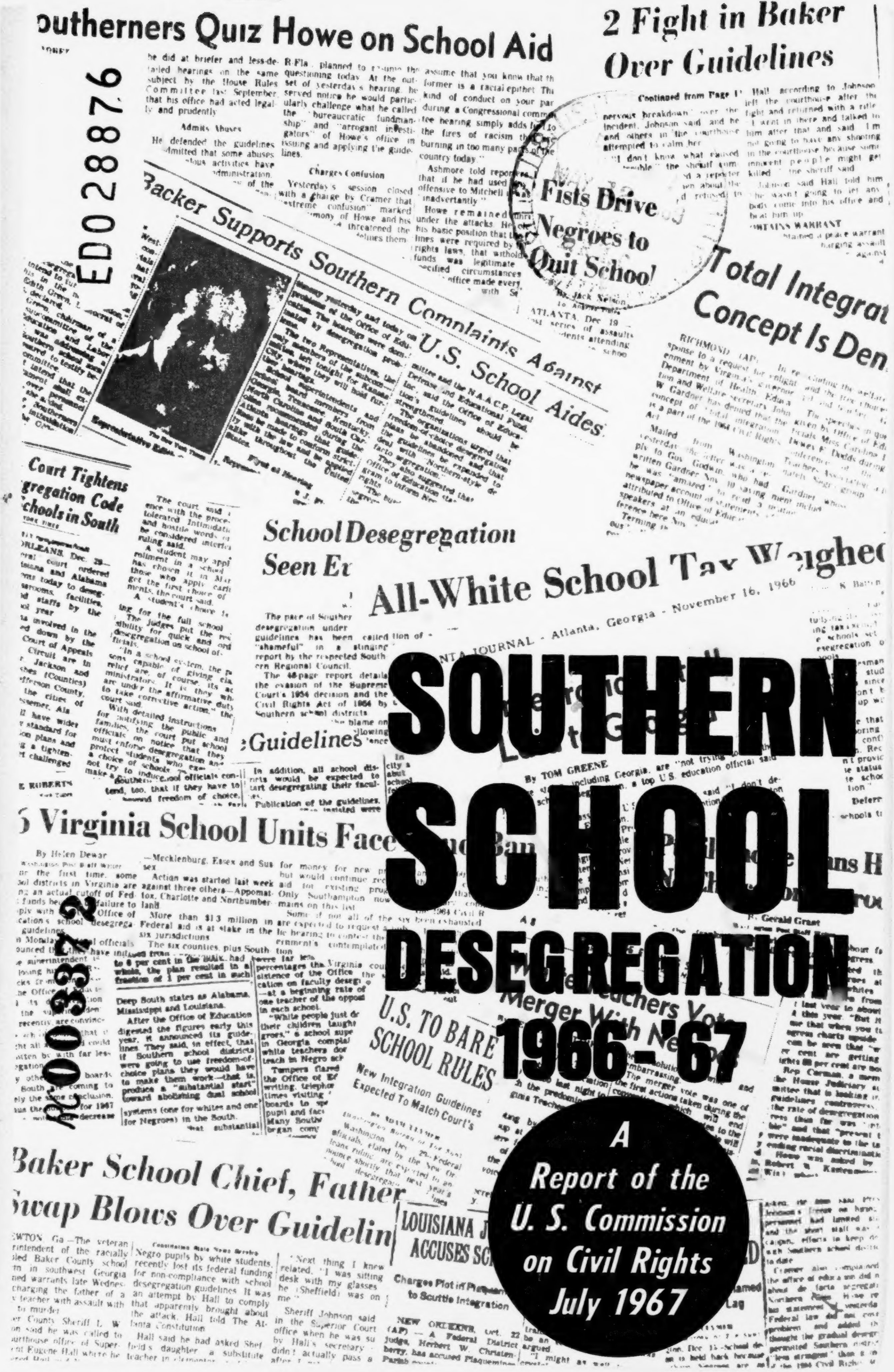
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School Desegregation Seen
All-White School Tax Weighed
ATLANTA JOURNAL - Atlanta, Georgia - November 16, 1966
Guidelines
6 Virginia School Units Face
Merger With Negroes
U.S. TO BARE SCHOOL RULES
New Integration Guidelines Expected To Match Court's
Baker School Chief, Father Swap Blows Over Guidelines
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SOUTHERN SCHOOL DESEGREGATION 1966-'67

A Report of the U. S. Commission on Civil Rights
July 1967

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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Southern School Desegregation, 1966-67

A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS

JULY 1967

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U. S. Commission on Civil Rights

The U.S. Commission on Civil Rights is a temporary, independent, bipartisan agency established by Congress in 1957 and directed to:

- Investigate complaints alleging that citizens are being deprived of their right to vote by reason of their race, color, religion, or national origin, or by reason of fraudulent practices;
- Study and collect information concerning legal developments constituting a denial of equal protection of the laws under the Constitution;
- Appraise Federal laws and policies with respect to equal protection of the laws;
- Serve as a national clearinghouse for information in respect to denials of equal protection of the laws; and
- Submit reports, findings, and recommendations to the President and the Congress.

Members of the Commission

JOHN A. HANNAH, *Chairman*
EUGENE PATTERSON, *Vice Chairman*
FRANKIE M. FREEMAN
ERWIN N. GRISWOLD
REV. THEODORE M. HESBURGH, C.S.C.
ROBERT S. RANKIN

WILLIAM L. TAYLOR, *Staff Director*

Letter of Transmittal

The U.S. Commission on Civil Rights
Washington, D.C., July 1967

The President
The President of the Senate
The Speaker of the House of Representatives

Sirs:

The Commission on Civil Rights presents to you this report pursuant to Public Law 85–315, as amended.

This study presents and analyzes information relating to school desegregation in the Southern and border States during the 1966–67 school year. This information was obtained by the Commission primarily from field investigations and analyses of the Department of Health, Education, and Welfare's files and the Department's operations commencing in the summer of 1966 and ending in the spring of 1967. The Commission has found that the percentage of Negro children attending desegregated schools in the Southern States in 1966–67 increased substantially over the previous school year, and that this numerical progress has been accompanied in many communities by a spirit of acceptance and understanding that would have seemed impossible during the era of "massive resistance" only a few years ago. Nevertheless, more than four-fifths of the Negro children in the 11 Southern States and more than nine-tenths of the Negro children in the five Deep South States still attend all-Negro schools. Although a majority of Negro children in half of the border States attend desegregated schools, large numbers of Negro children in other border States continue to attend all-Negro or virtually all-Negro schools. In the Southern States very little desegregation of full-time teachers has taken place.

The Commission's study shows that there is still much to be accomplished to secure the constitutional rights of Negro students. Our recommendations suggest this may be done, for example, by strengthening the present requirements which the Department of

Health, Education, and Welfare has promulgated under Title VI and by improving the procedures by which compliance is monitored.

We urge your consideration of the facts presented and the recommendations for corrective action.

Respectfully yours,

JOHN A. HANNAH, *Chairman*
EUGENE PATTERSON, *Vice Chairman*
FRANKIE M. FREEMAN
ERWIN N. GRISWOLD
REV. THEODORE M. HESBURGH, C.S.C.
ROBERT S. RANKIN

WILLIAM L. TAYLOR, *Staff Director*

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* No longer with the Commission.

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1. INTRODUCTION

On February 20, 1967, the Commission issued *Racial Isolation in the Public Schools*, a report on the extent and effect of racial segregation in school systems in all parts of the country. The study, which focused on metropolitan areas, was concerned principally with school segregation arising from sources other than compulsion by law. The present study is concerned with the progress of school desegregation in the Southern and border States. In these States prior to 1954, school segregation was required, or expressly permitted, by law. Such States were required by the decisions of the Supreme Court in *Brown* v. *Board of Education* [1] to disestablish their dual school systems.

A decade of litigation produced only token compliance with the *Brown* decision. Upon the enactment of Title VI of the Civil Rights Act of 1964,[2] the major Federal role in Southern school desegregation shifted from the Federal courts to the Department of Health, Education, and Welfare. Title VI prohibited racial discrimination against beneficiaries of Federal financial assistance. Each Federal agency giving financial assistance—including aid to education—was required to effectuate this policy by issuing regulations.[3] Failure to comply with such regulations was made punishable by termination of the assistance after a hearing.[4]

The sanction of withdrawal of Federal assistance has acquired increasing significance with the rapid rise in such assistance under recently expanded Federal aid to education programs. Principally as a result of the enactment of the Elementary and Secondary Education Act of 1965 (ESEA)[5], Federal financial assistance under such programs now is so significant a portion of school budgets that it cannot be disregarded.[6]

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[1] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[2] 78 Stat. 252 (1964), 42 U.S.C. 2000d–2000d–4 (1964).

[3] 78 Stat. 252 (1964), 42 U.S.C. 2000d–1 (1964).

[4] *Ibid.*

[5] 79 Stat. 27 (1965), 20 U.S.C. 241a–241*l*, 331a–332b, 821–827, 841–848, 861–870, 881–885 (1966). See especially 20 U.S.C. 241a–241*l* (Title I of ESEA).

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[6] During Fiscal Year 1966, the Office of Education paid the following sums to the Southern and border States (Fiscal 1967 estimates are shown in parentheses): Alabama, $67,901,437 ($72,100,512); Arkansas, $39,919,451 ($41,815,650); Delaware, $7,013,806 ($8,990,271); Florida, $79,039,752 ($87,256,626); Georgia, $78,118,953 ($86,043,212); Kentucky, $60,652,756 ($63,608,175); Louisiana, $55,084,973 ($65,003,131); Maryland, $52,226,351 ($63,306,042); Mississippi, $44,549,671 ($49,737,223); Missouri, $60,468,040 ($68,267,745); North Carolina, $96,881,225 ($101,891,291); Oklahoma, $49,053,909 ($52,443,487); South Carolina, $48,270,266 ($52,355,639); Tennessee, $65,545,862 ($70,471,297); Texas, $165,823,687 ($180,469,462); Virginia, $74,686,510 ($85,466,660); and West Virginia, $31,544,984 ($33,042,500). Figures obtained from U.S. Office of Education, Budget Branch, Office of Administration (Dept. HEW), April 1967. Of the 63 school districts visited by Commission staff, 46 were able to provide the Commission with figures showing the percentage of their total funds attributable to Federal sources. Of this number, 17 received 20% or more of their funds from Federal sources. Federal funds comprised 30% or more of the budgets of several districts, *e.g.*, Calvert School District (Robertson, Texas) (36.5%); Green Co. (Alabama) (37%); Idabel Public Schools (McCurtain Co., Oklahoma) (30%).

2. SCOPE OF REPORT

In February 1966, the Commission published its first report on the effectiveness of Title VI in achieving public school desegregation in the Southern and border States.[7] That survey demonstrated that in 1965, although significant progress had been made under Title VI in obtaining the agreement of school districts to desegregate their schools, the number of Negro children actually attending schools with white children in the Deep South still was very low. The Commission found after staff visits to a cross-section of school districts that the slow pace of integration in Southern and border States was attributable in large measure to the fact that most school districts in the South had adopted so-called "free choice plans" as the principal method of desegregation. Under such plans, students who formerly were assigned to schools on the basis of race were given an opportunity each school year to choose the school they wanted to attend on a nonracial basis, subject to limitations imposed by overcrowded facilities.

Freedom of choice plans accepted by the Office of Education of the Department of Health, Education, and Welfare had failed to disestablish the dual school systems in Southern and border States, the Commission determined. This failure was attributable to the fact that such plans did not eliminate the racial identity of the schools and placed the burden of change upon Negro parents and pupils who often were reluctant to assert their rights for fear of harassment and intimidation by hostile white persons. The Commission found that, in some areas of the South, there had been physical violence and economic reprisal against Negro students and parents of Negro students who had elected under such plans to attend formerly all-white schools. The Commission also found that during 1965, the Office of Education did not have adequate procedures for evaluating plans and assurances and lacked adequate staff and procedures for detecting violations of Title VI. The Commission determined that efforts to monitor compliance largely were limited to investigation of complaints filed; that commencement of enforcement proceedings had been virtually limited to cases where school districts had defied the law openly by failing to file any assurance or plan, and that no enforcement proceeding had been instituted against a district for violation of an accepted plan or assurance.

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[7] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States 1965–66* (Feb. 1966).

This report is designed to supplement the Commission's 1966 survey. The purpose of this report is to assess what recent progress has been made in school desegregation under Title VI, what current problems remain unsolved, and what corrective steps should be taken now. This study concentrates, therefore, upon the school desegregation standards promulgated by the Office of Education for the implementation of Title VI subsequent to the Commission's 1966 report, and on the effectiveness of the Office of Education's recent enforcement efforts. This report is based upon field investigations, a review of the Office of Education files, interviews with Office of Education and Department of Justice officials, and other persons active in the school desegregation field, and the examination of available literature including judicial opinions and transcripts of Congressional hearings dealing with the efforts of the Office of Education to implement Title VI.

3. THE STATISTICAL STORY 1966-67

In the first 10 years after the Supreme Court's decisions in the school segregation cases,[8] the number of Negro pupils attending school with white students in the 17 Southern and border States which previously had required or authorized school segregation increased at an average rate of about 1 percent a year, according to statistics compiled by correspondents for the Southern Education Reporting Service.[9] By the end of the 1964–65 school year, 10.9 percent of the Negro students in this region were in biracial classrooms—an increase of 1.7 percentage points over the 1963–64 figure (9.2 percent), which in turn represented an increase of 1.2 percent over 1962–63. In 1965–66, however—the first school year in which Title VI became effective—the percentage of Negro students attending biracial schools in the Southern and border State region increased to 15.9 percent.[10]

There was a marked contrast between progress in the South and in the border region. Up through the 1962–63 school year, less than 1 percent of the Negro students in the 11 Southern States of the old Confederacy attended school with white students. The 1 percent mark was passed in 1963–64 and almost doubled in 1964–65, to 2.25 percent. For the 1965–66 school year, the percentage more than doubled, according to the Southern Education Reporting Service, reaching 6.01 percent.[11]

In contrast, the six border States and the District of Columbia desegregated at a faster rate than the Southern States. By 1961–62, more than half of the Negro students in the border region were attending biracial schools. The annual rate of change in this region was about 3 percent a year. By 1964–65, the border area had 58.3 percent of its Negro enrollment in school with white students. By 1965–66, the figure was 68.9 percent—an increase of more than 10 percentage points over the previous year.[12]

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[8] *Brown* v. *Board of Education* 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[9] Leeson, *Faster Pace, Scarcer Records*, Southern Education Report 28–32 (Jan.–Feb. 1966).

[10] *Ibid.*

[11] *Ibid.* The Office of Education, based on a sampling of 590 districts through a telephone survey conducted in cooperation with State departments of education, estimated the figure at 7.5 percent. Civil rights organizations, relying upon a variety of sources, including field workers, advanced estimates lower than 6 percent. See U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States 1965–66* at 27–28. (Feb. 1966).

In the 1966–67 school year, the trend continued to be favorable.[13] Using the Office of Education estimates, the overall comparative percentage breakdown for 1965–66 and 1966–67 is as follows:[14]

	Percentage of Negro Students in Schools Which Are Not all-Negro	
	1965	1966
17 Southern and border States	*15.1*	*24.4*
11 Southern States	*7.5*	*16.9*
6 Border States	*65.6*	*67.8*

In four of the five Deep South States (Mississippi, Louisiana, South Carolina and Georgia) the percentages rose substantially, as the following chart shows:

	Percentage of Negro Students in Schools Which Are Not all-Negro	
State	1965	1966
Mississippi	*0.4*	*3.2*
Louisiana	*0.6*	*3.5*
South Carolina	*1.5*	*6.0*
Georgia	*2.4*	*9.9*

In two States, however,—Alabama and Missouri—both the number and percentage of Negro children attending schools which are not all-Negro *declined* during the 1966–67 school year. In the Fall of 1965 (according to Office of Education estimates) there were 15,300 such Negro children in Alabama, or 5.3 percent of all Negro pupils.[15] The corresponding figures for Fall 1966 were 12,900, or 4.7 percent. In Missouri, such Negro children declined from 85,500 or 74.4 percent in Fall 1965, to 83,460, or 64.2 percent in Fall 1966. The Office of Education State-by-State estimated breakdown follows:[16]

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[12] Leeson, *supra.*

[13] Beginning with the year in which the first Negro child entered a formerly all-white school, in each year until 1965–66, the number of Negroes attending such schools in the Southern and border States grew more slowly than the growth in Negro enrollment. In 1965–66, the number of Negro students in such schools increased by 118,173, and the total Negro enrollment rose by only 70,923. For the 1966–67 school year, an additional 305,665 Negroes attended public schools which were not all-Negro, while Negro enrollment rose by only 74,790. *School Desegregation in the Southern and Border States, Feb. 1967,* Compiled by the Southern Education Reporting Service.

[14] U.S. Office of Education, National Center for Educational Statistics, Dec. 6, 1966. The 1965 percentages were based on a sample survey. The 1966 percentages are based on projections from data collected in the Fall of 1966 from approximately 80 percent of the 5,000 school districts in the Southern and border States. Office of Education explanation accompanying figures. For a complete statistical breakdown, see Appendix I.

State	Number of Negro Pupils in Schools which are not 100% Negro		Negro Pupils in Schools which are not 100% Negro as a percentage of all Negro Pupils	
	Fall *1965*	Fall *1966*	Fall *1965*	Fall *1966*
GRAND TOTAL..	*503,600*	*829,760*	*15.1*	*24.4*
Southern States, Total..	*216,600*	*489,900*	*7.5*	*16.9*
Alabama............	*15,300*	*12,900*	*5.3*	*4.7*
Arkansas............	*6,100*	*19,550*	*6.3*	*16.6*
Florida..............	*23,800*	*58,150*	*8.4*	*20.8*
Georgia.............	*7,600*	*34,050*	*2.4*	*9.9*
Louisiana...........	*1,600*	*9,350*	*0.6*	*3.5*
Mississippi..........	*1,000*	*8,500*	*0.4*	*3.2*
North Carolina......	*24,500*	*54,750*	*6.5*	*15.6*
South Carolina.......	*3,500*	*14,750*	*1.5*	*6.0*
Tennessee...........	*25,300*	*58,850*	*14.0*	*31.7*
Texas...............	*81,700*	*160,050*	*21.7*	*47.3*
Virginia............	*26,300*	*59,000*	*14.1*	*24.8*
Border States, Total....	*287,000*	*339,860*	*65.6*	*67.8*
Delaware............	*15,900*	*24,100*	*77.9*	*100.0*
Kentucky...........	*50,900*	*38,220*	*81.4*	*88.5*
Maryland...........	*96,400*	*140,550*	*55.7*	*64.0*
Missouri............	*85,500*	*83,460*	*74.4*	*64.2*
Oklahoma...........	*24,800*	*34,310*	*51.0*	*55.7*
West Virginia........	*13,500*	*19,220*	*75.8*	*84.3*

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[15] A sharp discrepancy appears between this figure and the estimate by the Southern Education Reporting Service in December of 1965 of the percentage of Negro students in Alabama attending school with white students (.43 percent). Southern Education Reporting Service, *Statistical Summary*, Dec. 1965.

[16] U.S. Office of Education, National Center for Educational Statistics, Dec. 6, 1966. In its 1966–67 *Statistical Summary*, the Southern Education Reporting Service (SERS) reports Office of Education figures for "estimated total desegregated Negroes" as of Feb. 1967, based on IBM print-outs made available to SERS by the National Center

Although the rate of desegregation has accelerated, more than 2.5 million Negro pupils still attend all-Negro schools in the Southern and border States. This is a greater number than the 2.2 million Negro pupils who attended all-Negro schools in these States at the time of the first *Brown* decision, and constitutes more than 75 percent of all Negro pupils in such States. In the 11 Southern States 83.1 percent of the Negro pupils attend all-Negro schools. In each of the Deep South States the percentage is higher than 90 percent; *i.e.*, Georgia 90.1 percent; South Carolina, 94.0 percent; Alabama, 95.3 percent; Louisiana, 96.5 percent, and Mississippi, 96.8 percent.[17]

Progress has been greater in the border States, which now have 161,540 students in all-Negro schools compared to 308,701 in the 1953–54 school year. Thus, in Delaware, there are no Negro children in this category;[18] in Kentucky, 11.5 percent; in West Virginia, 15.7 percent. In several border States, on the other hand, more than a third of the Negro students attend all-Negro schools—in Missouri, 35.8 percent; in Maryland, 36 percent; and in Oklahoma, 44.3 percent.[19]

Judging the extent of "desegregation" by the number and percent of Negro pupils who are not in all-Negro schools can be misleading, since the placement of a single white, Indian, or Chinese child in an otherwise all-Negro school has the effect of transferring large numbers of Negro children to the statistical category of those attending schools which are not all-Negro. For this reason, in reporting its current figures, the Office of Education has included, and regards as most significant, figures showing the percentage of Negro children attending schools which are more than 95 percent Negro or less

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for Educational Statistics. Except for Louisiana (21,600), Maryland (126,800), and Missouri (101,100) the changes were not substantial. The Feb. figures have not officially been published by the Department of Health, Education, and Welfare and the accuracy of these print-outs has been questioned by officials within the Department. Staff interview with Robert Brown, formerly Program Manager, Equal Educational Opportunities Program (and at the time of the interview, Acting Director for Management with the Office for Civil Rights of the Department of Health, Education, and Welfare), June 30, 1967, and John Hodgdon, then Acting Director, Planning Division, Equal Educational Opportunities Program, June 30, 1967.

[17] *Ibid.*

[18] Although there are no all-Negro schools in Delaware, there are schools which are nearly all-Negro. For example, in April 1967, one high school in Sussex County, Delaware had 264 Negro students and only 15 white students, all of whom were in a special class for the trainable mentally retarded. Wilmington had one school with three white students and 333 Negro students, another with three white students and 533 Negro students and four schools in which white students numbered 20 or less and Negro students ranged from 200 to almost 800. Staff interview with Douglas M. Macmillan, Educational Program Specialist, Equal Educational Opportunities Program (hereafter EEOP), April 17, 1967.

[19] U.S. Office of Education, National Center for Educational Statistics, Dec. 6, 1966.

than 95 percent Negro.[20] Since this is the first year in which the Office of Education has reported such statistics, comparative figures for the 1965–66 school year are unavailable.

During the 1966–67 school year, in the 17 Southern and border States, 17.3 percent of the Negro children are attending schools which are less than 95 percent Negro. In several border States the percentage of Negro children attending these schools is strikingly high: 88.5 percent in Kentucky, 84.8 percent in Delaware, 83.4 percent in West Virginia. In other border States it is much lower: 40.5 percent in Maryland, 40.5 percent in Oklahoma, and 26.7 percent in Missouri.[21] The following chart gives the figures for the Southern States, together with the figures showing the percentage of Negro pupils attending schools less than 100 percent Negro:[22]

State	*Percentage of Negro Pupils Attending Schools Less than 95 % Negro*	*Percentage of Negro Pupils Attending Schools Less than 100 % Negro*
Alabama	*2.4*	*4.7*
Mississippi	*2.6*	*3.2*
Louisiana	*2.6*	*3.5*
South Carolina	*4.9*	*6.0*
Georgia	*6.6*	*9.9*
North Carolina	*12.8*	*15.6*
Arkansas	*14.5*	*16.6*
Florida	*14.7*	*20.8*
Virginia	*20.0*	*24.8*
Tennessee	*21.9*	*31.7*
Texas	*34.6*	*47.3*

In several border States large numbers of Negro children are attending schools which have substantial numbers of white children. In Delaware, Kentucky, and West Virginia a large majority of Negro school children attend schools which are less than 80 percent Negro. In Kentucky, a majority attend schools which are less than 20 percent Negro. In one of the Southern States, Texas, 32 percent of the Negro children attend schools which are less than 80 percent Negro.[23]

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[20] Staff interview with David S. Seeley, then Assistant Commissioner for Equal Educational Opportunities, Dec. 28, 1966. (Seeley Interview).

[21] U.S. Office of Education, National Center for Educational Statistics, Dec. 9, 1966.

[22] *Id.*, Dec. 6, 1966; Dec. 9, 1966.

[23] See Appendix I.

4. THE GUIDELINES

A. *The 1965 Guidelines*

Beginning in January 1965, the branch of the Office of Education charged with enforcement of Title VI of the Civil Rights Act of 1964 (then called the Office of Equal Educational Opportunities and later the Equal Educational Opportunities Program), commenced negotiations with individual school districts to encourage them to submit satisfactory voluntary desegregation plans.[24] In order to make allowance for problems peculiar to individual school districts, and to avoid setting minimum standards which might be interpreted as establishing maximum expectations, the Equal Educational Opportunities Program (EEOP) staff purposefully neglected to communicate to school districts any general, uniform requirements that a satisfactory desegregation plan had to fulfill. Proceeding on a district by district basis, however, soon proved impracticable. Most of the plans submitted by districts which had maintained segregated schools clearly were inadequate to eliminate the dual school system. Further, it became obvious that the limited EEOP staff lacked the physical resources to negotiate on an individual basis with the hundreds of school districts expected to submit acceptable desegregation plans in time to commence meaningful desegregation in the Fall of 1965.[25]

On April 29, 1965, the Office of Education issued its first set of uniform, generally applicable standards implementing Title VI in the area of school desegregation. These standards—commonly referred to as "guidelines"[26]—were based upon the Regulation issued by the Department of Health, Education, and Welfare to effectuate the provisions of Title VI.[27] That Regulation, and the 1965 guidelines, provided three methods by which a school district could qualify for Federal financial assistance: (1) if the district were fully desegregated, it could execute an assurance of compliance (HEW Form 441); (2) if the district were subject to a "final" order of a court of the United States requiring desegregation of the school system, it could submit the order and agree to comply with the order and any modification of it, or (3) if the district fell into neither category it could submit a plan for the desegregation of the school system which the Commissioner of Education determined was adequate to accomplish the purposes of the Civil Rights Act of 1964.[28] Even if a court order imposed standards less onerous than those imposed by the Department of Health, Education, and Welfare upon districts submitting voluntary plans, the guidelines permitted the district under the order to comply with the guidelines by complying with the order. When the 1965 guidelines were issued, many of the outstanding desegregation orders imposed standards far short of the standards which the guidelines imposed on districts submitting voluntary plans.[29]

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[24] Unpublished draft of background paper prepared by EEOP Information Office, Feb. 3, 1966.

[25] *Ibid.*

[26] These guidelines officially were entitled "General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools" (hereinafter cited as 1965 guidelines). They are more fully discussed in the Commission's report, *Survey of School Desegregation in the Southern and Border States 1965–66* (Feb. 1966).

The guidelines provided that an assurance of compliance could not be executed by a school system in which race remained a factor in pupil assignment or in the assignment of teachers and other staff serving pupils or if any activity, facility, or other service, including transportation, was segregated on the basis of race, color, or national origin, or if there remained "any other practices characteristic of dual or segregated school systems."[30]

The standards imposed upon school systems submitting voluntary desegregation plans dealt with two important questions among others: the pace of desegregation—slow even in many districts under court order, and nonexistent in many districts in which no lawsuit had been filed—and the method of student assignment. The guidelines required desegregation of at least four grades in the fall of 1965,[31] and set the fall of 1967 as the "target date" for desegregating all grades.[32] School districts attempting to qualify for Federal financial assistance by submitting a desegregation plan were given three options with respect to the assignment of students: assignment on the basis of unitary, nonracial geographic attendance areas; assignment on the basis of a choice of school freely exercised by the pupil and his parents or guardians (freedom of choice); or assignment on the basis of a combination of these two principles.[33]

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[27] 45 C.F.R. Part 80, entitled "Nondiscrimination in Federally Assisted Programs of the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964."

[28] 1965 guidelines II A–C.

[29] For example, many outstanding court orders provided for grade-a-year desegregation, under which desegregation of all grades would not have been achieved until some time in the 1970s. The 1965 guidelines required voluntary-plan districts to desegregate all grades by the fall of 1967.

[30] *Id.* at III.

[31] *Id.* at V, E, 4, a(1).

The 1965 guidelines specified that the responsibility to eliminate segregation rested with school authorities and was not satisfied by rules and practices which shifted the burden of removing racial discrimination to persons formerly discriminated against.[34] Nevertheless, the guidelines permitted the use of free choice plans so long as they met detailed requirements designed to insure an informed and unhampered choice of school.[35]

In addition, the race of pupils was not to be considered in the assignment of new teachers[36] and steps were to be taken toward eliminating existing teacher segregation.[37] Compliance reports were required from each school in the district.[38] The guidelines stated that the Commissioner of Education could "from time to time redetermine the adequacy of any desegregation plan to accomplish the purposes of the Civil Rights Act."[39]

B. *The 1966 Guidelines*

During the early part of the school year 1965–66, Commission staff surveyed a cross-section of school districts in Southern and border States. The Commission found that the slow pace of integration in these States was attributable in large measure to the fact that "[f]reedom of choice plans accepted by the Office of Education . . . [had] not disestablished the dual and racially segregated school systems."[40] The Office of Education subsequently determined that:

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[32] *Id.* at V, E, 2.
[33] *Id.* at V, A, 1–3.
[34] *Id.* at V, D.
[35] *Id.* at V, D, 1–8.
[36] *Id.* at V, B, 1a.
[37] *Id.* at V, B, 1b.
[38] *Id.* at VI.
[39] *Id.* at V, B, 6.
[40] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States, 1965–66*, at 51 (Feb. 1966).

> . . . it was clear that something would have to be done for the following school year if we were going to avoid having a third year go by after the passage of the Act with virtually no effective action by local school officials in some areas to desegregate their schools.[41]

On March 7, 1966, new guidelines governing desegregation during the school year commencing in the fall of 1966 were issued.[42] While the 1966 guidelines contain more detailed procedures for the abolition of dual school systems, the basic provisions do not differ in principle from the 1965 guidelines, except in one important respect. The guidelines lay down certain "Requirements for Effectiveness of Free Choice Plans", which set forth criteria by which the Commissioner may determine whether the plan is operating fairly or effectively. These provisions establish standards, in terms of an increase over the prior year in the percentage of students transferring from segregated schools, which school districts "normally" are expected to satisfy. Setting forth the rationale for these percentage standards, the guidelines provide that:

> The single most substantial indication as to whether a free choice plan is actually working to eliminate the dual school structure is the extent to which Negro or other minority group students have in fact transferred from segregated schools.[43]

Those districts which did not maintain any characteristics of a dual school system still were permitted to comply by submitting formal assurances to that effect (Form 441).[44] Districts desegregating under court order still were allowed to submit the order in lieu of a voluntary desegregation plan.[45] School systems which previously had submitted a plan were not required to submit a revised plan but simply were required to sign a standard assurance that they would abide by the applicable requirements for such plans contained in the revised guidelines.[46]

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[41] Testimony of Harold Howe II, United States Commissioner of Education, *Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary*, 89th Cong. 2d Sess., ser. 23 at 23 (1966).

[42] Officially entitled "Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964", 45 C.F.R. Part 181 (hereinafter cited as "1966 guidelines"). This Revised Statement was amended and republished on Dec. 30, 1966. The amendments are essentially minor ones and are noted *infra* at pp. 18–19.

[43] *Id.* at 181.54. The percentage provisions are more fully discussed *infra* at pp. 23–25.

[44] *Id.* at 181.5(a).

[45] *Id.* at 181.6(a).

[46] HEW Form 441-B, 45 C.F.R. 181.7(a). For a discussion of this Form, see p. 37 Note 159 *infra.* The requirement of an assurance is based on the Departmental Regulation. See 45 C.F.R. 80.4(c).

Basic Requirements

The 1966 guidelines set forth certain basic requirements for all voluntary desegregation plans.

Faculty and Staff

In some districts, Negro teachers have been discharged when formerly all-Negro schools have been closed as a result of transfers of Negro students to white schools under free choice plans.[47] Vacancies sometimes have been filled not with displaced Negro teachers, but with additional white teachers hired from outside the system.[48] There are court decisions holding these practices unconstitutional.[49] The guidelines establish rules intended to guarantee nondiscriminatory treatment of teachers in the event of staff displacement resulting from desegregation. In addition to prohibiting discharges on account of race, the guidelines specify that where a staff vacancy results from desegregation (1) it may not be filled by recruiting outside the system unless the school officials can show that no such displaced staff member is qualified to fill the vacancy, and (2) the qualifications of all staff members in the system must be evaluated in selecting the staff members to be released.[50]

Unequal Educational Programs and Facilities

Although the *Brown* decision decreed that racially separate educational facilities are inherently unequal, inferior physical facilities also deprive students subjected to them of equal educational opportunities. Some school systems still maintain small, inadequate schools originally established, and still used, for Negro students. The courts have determined that an adequate desegregation plan should provide for closing such schools.[51] The guidelines provide that if the facilities, teaching materials, or educational program available to students in such a school are inferior to those generally available in the schools of the system, the school authorities normally will be required immediately to assign such students to other schools in order to discontinue the use of the inferior school.[52]

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[47] See, *e.g.*, *Smith* v. *Board of Education of Morrilton School District No. 32*, 365 F.2d 770 (8th Cir. 1966).

[48] *Ibid.*

[49] See, *e.g.*, *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (8th Cir. 1966).

[50] 1966 guidelines, 181.13(c). In addition, the guidelines impose certain requirements with respect to nonracial assignment of professional staff. These requirements are described in detail at pp. 24–25 *infra.*

[51] See *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir. March 29, 1967; *Harris* v. *Bullock County Board of Education*, 253 F. Supp. 276 (M.D. Ala. 1966); *Carr* v. *Montgomery County Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966).

Services, Facilities, Activities and Programs

The courts have determined that desegregation of a school system must include abolition of racial classifications in school athletics and other extracurricular activities and in the school transportation system.[53] Under the 1966 guidelines all services, facilities, activities, and programs (including transportation, athletics, and other extracurricular activities) conducted or sponsored by, or affiliated with the schools of the system are required to be run on a desegregated, nondiscriminatory basis.[54] Thus, a waiting period for participation in extracurricular activities, which may otherwise apply to transfer students, cannot be applied to a student changing his school as a result of desegregation. Dual or segregated transportation routes are forbidden.[55]

Additional Requirements for Voluntary Desegregation Plans Based on Geographic Attendance Zones

There have been instances where school authorities, in rezoning school attendance zones purportedly to accomplish desegregation, have gerrymandered the zone lines in an effort to preserve racial segregation.[56] Under the guidelines a school district adopting a desegregation plan based on geographic zoning must establish a single system of nonracial attendance zones. It may not use zone boundaries or feeder patterns "designed to perpetuate or promote segregation, or to limit desegregation."[57]

A school system intending to use a combination of geographic zoning and free choice, or free choice within geographic zones, must show "that such an arrangement will most expeditiously eliminate segregation and all other forms of discrimination."[58]

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[52] 1966 guidelines at 181.15.

[53] See *United States* v. *Jefferson County Board of Education*, *supra* note 51, and *Harris* v. *Crenshaw County Board of Education*, 259 F. Supp. 167 (M.D. Ala. 1966).

[54] 1966 guidelines at 181.14(a).

[55] *Id.* at 181.14(b) (1) and (2).

[56] See *Northcross* v. *Board of Education of City of Memphis*, 333 F.2d 661 (6th Cir. 1964), and *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir. 1965).

[57] 1966 guidelines at 181.32.

Each student in a geographic zone system must be assigned to the school serving his zone of residence.[59] In addition, to ensure that substantive desegregation resulting from geographic zoning is not nullified by resegregation through voluntary transfers, such transfers are allowable only for specified reasons: *i.e.* (1) to attend a course of study not offered at his zone school or to attend a school for the physically handicapped; (2) to attend a school where his race is in the minority; and (3) to attend another school for which he is specifically qualified "pursuant to the provisions of a desegregation plan accepted by the Commissioner."[60]

The guidelines also provide for the mailing of individual notice to parents of (1) the plan, (2) the schools to which their children are assigned, and (3) available bus service, and for conspicuous publication of the notice.[61] A map showing the boundaries of, and the school serving, each attendance zone must be made freely available for public inspection at the office of the superintendent.[62] School officials must submit, with their April 15 report, a map showing the name and location of each school facility, the attendance zones, and any contemplated changes. A school system proposing revisions of attendance zones must submit data showing the estimated change in attendance by race, and in the racial composition of the professional staff, at each school to be affected.[63]

Additional Requirements for Voluntary Desegregation Plans Based on Free Choice

The effectiveness of a free choice plan is undermined, courts have held, when students initially are assigned on the basis of race and only then allowed to transfer to a school in which they constitute a minority.[64] Instead, an effective freedom of choice plan must be based upon an annual choice of schools that is informed and unhampered.[65] The decisions also hold that where it is physically impossible to grant every choice, as in the case of overcrowding, assignments should be based upon some objective criterion, and that adequate transportation facilities must be furnished to allow implementation of the choice.[66]

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[58] *Ibid.*

[59] *Id.* at 181.33.

[60] *Id.* at 181.33 (a), (b), and (c).

[61] *Id.* at 181.34 (a) and (b).

[62] *Id.* at 181.34(c).

[63] *Id.* at 181.35(a).

[64] See *United States* v. *Jefferson County Board of Education, supra* note 51; *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865 (5th Cir. 1966); *Lock[illegible]* v. *Board of Education of Muscogee County*, 342 F.2d 225 (5th Cir. 1965) and cas[illegible]ed therein.

[65] *Ibid.*

The following requirements of the 1966 guidelines are designed to implement these principles:

A student who is 15 years-old or more or is entering the ninth or a higher grade must be permitted to exercise his own choice, which is controlling in the absence of a different choice by his parent.[67] Each student must be required to exercise a free choice of schools. To insure that records are kept of choices made, the choice is made mandatory. The choice is to be exercised once annually during a 30-day period between March 1 and April 30 preceding the school year for which the choice is to be made.[68]

Late choices must be subordinated to choices made during the choice period. Any student who has not exercised his choice within a week after school opens must be assigned to the school nearest his home.[69]

On the first day of the choice period each school system is required to distribute to each student a letter, an explanatory notice, and a choice form—each in a form prescribed by the Commissioner—by first class mail, with a return envelope addressed to the superintendent.[70]

A choice once submitted may not be changed, except for "compelling hardship", to permit transfer to a school meeting the special needs of the student, or in the event of change of residence to an area closer to another school serving the student's grade level.[71]

In case of overcrowding, preference must be given on the basis of the proximity of schools to the homes of students, without regard to race, except that preference may be given to any student who chooses a school at which students of his race are a minority. Standards for determining overcrowding and available space applied uniformly throughout the system must be used if any choice is to be denied. Any student whose choice is denied must be notified promptly in writing and given his choice of each school in the system serving his grade level where space is available.[72]

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[66] See cases cited note 64 *supra.*

[67] *Id.* at 181.42.

[68] *Id.* at 181.43 and 181.44. For the 1967–68 school year the 30-day period may start as early as Jan. 1. See *infra.*

[69] *Id.* at 181.45.

[70] *Id.* at 181.46(a).

[71] *Id.* at 181.48.

No factor except overcrowding may limit assignment of students to schools on the basis of their choices. Where transportation generally is provided, buses must be routed to the maximum extent feasible so as to serve each student choosing any school in the system. In any event, every student choosing the formerly white or formerly Negro school nearest his residence must be transported to the school to which he is assigned, whether or not it was his first choice, if that school is sufficiently distant from his home to make him eligible for transportation under generally applicable transportation rules.[73]

No official, teacher, or employee of the school system, directly or indirectly, may seek to influence any parent or student in the exercise of a choice, or favor or penalize any person because of a choice made.[74]

C. *The December 1966 Amendments*

Amendments to the 1966 guidelines were published at the end of December 1966. In a memorandum accompanying transmission of these amendments to school officials the Commissioner noted that "the only substantive change is to permit the 30-day period in free choice plans to start as early as January 1."[75] This change was made because many school districts had indicated that the earlier choice period would enable them to assess their progress sooner and make it easier to conduct a second choice period, if necessary, before children left for their summer vacations and office staff was reduced for the summer.[76]

The December 1966 amendments also provided that "staff desegregation for the 1967–68 school year must include significant progress beyond what was accomplished for the 1966–67 school year in the desegregation of teachers assigned to schools on a regular full-time basis." Except for the change in dates (1967–68 for 1966–67 and 1966–67 for 1965–66), this requirement is identical with what was required the previous year. Similarly, the expected percentage increase in student desegregation under free choice plans remains substantially unchanged.[77]

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[72] *Id.* at 181.49.
[73] *Id.* at 181.51.
[74] *Id.* at 181.52.
[75] Memorandum from Commissioner Howe to superintendents and Boards of Education of school systems qualifying for Federal financial assistance under voluntary plans, Jan. 1967.
[76] Staff interview with Harold B. Williams, then Deputy Assistant Commissioner, May 22, 1967.

Subpart F of the 1966 guidelines consisted of provisions applicable only to school districts with plans of desegregation not reaching all school grades.[78] These provisions do not appear in the December 1966 amendments, applicable to the 1967–68 school year, since plans of desegregation for the 1967–68 school year are acceptable only if they reach all grades.

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[77] See *infra* at pp. 23–24.

[78] 1966 guidelines 181.71–181.76.

5. *EQUAL EDUCATIONAL OPPORTUNITIES PROGRAM*

A. *Organization*

In the 1966–67 school year, as in 1965–66, the guidelines were administered by the Equal Educational Opportunities Program of the Office of Education. EEOP reviewed desegregation plans and assurances, conducted investigations to determine whether school districts were in compliance with Title VI, the Regulation and the guidelines, and, if not, attempted to obtain voluntary compliance.[79] At the head of EEOP was an Assistant Commissioner.

Five geographic divisions handled both Title VI enforcement and activities under Title IV of the Civil Rights Act of 1964.[80] The following organizational chart shows the structure of EEOP during the summer immediately preceding the 1966–67 school year, including the States encompassed in each geographical area.

B. *Funding and Staffing*

For Fiscal 1967, HEW requested $1,543,000 for EEOP compliance activities. Congress gave it $766,000.[81] EEOP had a total pro-

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[79] On May 11, 1967, the Secretary of Health, Education, and Welfare announced that all civil rights compliance activities within the Department had been consolidated in the Office of the Secretary. F. Peter Libassi, Special Assistant to the Secretary on Civil Rights, will be director of the new consolidated office for civil rights. Under the new organization, the Office of Education, which administers the Federal aid to education programs, will have no part in Title VI compliance activities. N.Y. Times, May 11, 1967.

[80] Title IV of the Civil Rights Act of 1964 authorizes the Commissioner of Education to give technical assistance in the implementation of desegregation plans to agencies responsible for operating public schools (42 U.S.C. 2000c–2). Section 404 provides for the establishment of institutes to provide special training for the elementary and secondary school personnel in order to improve their ability to deal with the special educational problems occasioned by desegregation (42 U.S.C. 2000c–3). Section 405 (42 U.S.C. 2000c–4) authorizes grants to permit school boards to give in-service training to personnel to help them deal with problems of desegregation or to employ specialists to advise in problems arising under desegregation. Prior to the summer of 1966, Title IV and Title VI activities had been conducted separately. In the summer of 1966, the activities were merged.

[81] Letter dated Feb. 28, 1967, from then Assistant Commissioner David Seeley to Charles C. Humpstone, then Assistant General Counsel, U.S. Commission on Civil Rights (Seeley letter).

EEOP ORGANIZATIONAL CHART

Office of the Assistant Commissioner

Resources & Materials	Executive Office	Deputy Program Coordinator	Research & Evaluation	Office of General Counsel (Office of the Secretary)

TITLE VI AND TITLE IV STAFF

Area I	*Area II*	*Area III*	*Area IV*	*Area V*
Dela.	Fla.	Ala.	Ark.	Mo.
Md.	Ga.	Miss.	La.	and the rest of the country.
N.C.	S.C.	Tenn.	Okla.	
Va.			Tex.	
W. Va.			Mo.*	
D.C.				

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* Missouri was divided between Area IV and Area V during the summer of 1966, but in the Fall of 1966 was placed in Area V.

fessional staff of 63 persons.[82] Forty-five professionals were assigned to the five geographic areas for Title VI enforcement. Of this number, 37 were assigned to the Southern and border States, and were responsible for the 1,786 school districts in the process of desegregating under voluntary plans.[83] There were four professionals assigned to Georgia; four to Alabama; four to Mississippi; one to Louisiana; and three to South Carolina.[84]

In its 1968 Summary of Title VI Manpower Requirements—based on a manpower survey which it conducted—EEOP estimated that approximately 142 professionals would be needed for enforcement operations alone and an additional 95 professionals for support services (*e.g.*, program direction, handling special inquiries, reports and statistics, resources and materials). In the budget request submitted by the Department of Health, Education, and Welfare to Congress for fiscal 1968, the Secretary asked for a total of 409 positions for all of the Department's civil rights activities, or an additional 131 positions over the request made for fiscal 1967.[85] The Secretary asked for an increase of 176 positions for his entire office.[86] The House Appropriations Committee allowed the Secretary half of the requested 176 persons, without indicating how many of this number (88) were to be used for civil rights enforcement.[87]

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[82] Seeley interview.

[83] Seeley letter. Other professionals were assigned to Title IV and administrative work. Equal Educational Opportunities Staff Information. Unpublished report submitted by EEOP to the Commission.

[84] Seeley letter. During the summer of 1966, EEOP compliance activities were invested with additional manpower through employment of 94 law students (90 of whom worked in the Southern and border States) and 11 professionals, including law professors, political science professors and professors of education. Equal Educational Opportunities Staff Information. Unpublished report submitted by EEOP to the Commission. For 1967, EEOP will use Southern educators to serve as compliance officers in the summer. N.Y. Times, May 12, 1967.

[85] *Hearings on the Departments of Labor, and Health, Education, and Welfare Appropriations for 1968 Before a Subcommittee of the House Committee on Appropriations,* 90th Cong. 1st Sess., pt. 3 at 1290 (1967).

[86] *Ibid.*

[87] H.R. Rep. No. 271, 90th Cong., 1st Sess. 44 (1967).

6. IMPLEMENTATION OF THE GUIDELINES

A. Implementation of Guidelines Standard for Student and Faculty Desegregation

The 1966 guidelines, which continue to apply for the 1967–68 school year, establish certain standards for evaluating the progress of student desegregation under freedom of choice plans. The guidelines provide that in the absence of evidence to the contrary, the Commissioner will assume that a free choice plan is "a viable and effective means of completing initial stages of desegregation in school systems in which a substantial percentage of the students have in fact been transferred from segregated schools."[88] Certain percentage criteria by which the Commissioner will be guided in scheduling districts with a sizeable percentage of Negro students for review are set forth.[89]

The guidelines provide that where the percentage of student transfers from segregated schools substantially deviates from the expectations in the guidelines, the Commissioner will (1) determine whether the plan is operating fairly and effectively "to meet constitutional and statutory requirements", and (2) if not, require "additional steps", including (where schools are still identifiable on the basis of staff composition as intended for a particular race) staffing changes to eliminate racial identifiability.[90] Under the guidelines, the Commissioner is given the option to require the school district to adopt a different type of desegregation plan if he concludes such steps would be ineffective or if they fail to remedy the defects in the operation of the plan.[91]

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[88] 1966 guidelines 181.54.

[89] *Ibid.* "In districts with a sizeable percentage of Negro or other minority group students, the Commissioner will, in general, be guided by the following criteria in scheduling free choice plans for review:

"(1) If a significant percentage of the students, such as 8 percent or 9 percent, transferred from segregated schools for the 1965–66 school year, total transfers on the order of at least twice that percentage would normally be expected.

"(2) If a smaller percentage of the students, such as 4 percent or 5 percent, transferred from segregated schools for the 1965–66 school year, a substantial increase in transfers would normally be expected, such as would bring the total to at least triple the percentage for the 1965–66 school year.

"(3) If a lower percentage of students transferred for the 1965–66 school year, then the rate of increase in total transfers for the 1966–67 school year would normally be expected to be proportionately greater than under [(2) above.]

"(4) If no students transferred from segregated schools under a free choice plan for the 1965–66 school year, then a very substantial start would normally be expected, to enable such a school system to catch up as quickly as possible with systems which started earlier. If a school system in these circumstances is unable to make such a start for the 1966–67 school year under a free choice plan, it will normally be required to adopt a different type of plan."

The guidelines also set forth certain requirements governing desegregation of faculty and staff which are applicable to all voluntary desegregation plans. These requirements prohibit the assignment of new teachers or new professional staff on a racial basis, except to correct the effects of past discriminatory practices.[92] With respect to past assignments, the guidelines announce that professional staff assignments may not be such that schools are racially identifiable, and that each school system has a "positive duty" to make reassignments necessary to eliminate past discriminatory practices.[93] Although, standing alone, these provisions seem to call for immediate, total desegregation of professional staff, the provisions are followed by a specific provision governing staff desegregation for the 1966–67 school year. This provision states that such desegregation must include "significant progress" beyond what was accomplished for the 1965–66 school year "in the desegregation of teachers assigned to schools on a regular full-time basis." A number of alternative patterns of staff assignment "to initiate staff desegregation" are suggested.[94]

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[90] *Ibid.*

[91] *Ibid.* "Where there is substantial deviation from these expectations, and the Commissioner concludes, on the basis of the choices actually made and other available evidence, that the plan is not operating fairly, or is not effective to meet constitutional and statutory requirements, he will require the school system to take additional steps to further desegregation.

"Such additional steps may include, for example, reopening of the choice period, additional meetings with parents and civic groups, further arrangements with State or local officials to limit opportunities for intimidation, and other further community preparation. Where schools are still identifiable on the basis of staff composition as intended for students of a particular race, color, or national origin, such steps must in any such case include substantial further changes in staffing patterns to eliminate such identifiability.

"If the Commissioner concludes that such steps would be ineffective, or if they fail to remedy the defects in the operation of any free choice plan, he may require the school system to adopt a different type of desegregation plan."

Section 181.11 authorizes the Commissioner to require the alternatives of closing small and inadequate schools, pairing schools attended by students of different races, establishing nonracial attendance zones, or a combination of these to eliminate dual school systems "as expeditiously as possible."

[92] *Id.* at 181.13(b): "*New Assignments.* Race, color, or national origin may not be a factor in the hiring or assignment to schools or within schools of teachers and other professional staff, including student teachers and staff serving two or more schools, except to correct the effects of past discriminatory assignments."

[93] *Id.* at 181.13.

Something far short of these standards was required in practice. No attempt was made to require school districts to live up to each of the two independent standards for student transfers and professional staff desegregation which the guidelines established. Instead, the approach was to enforce Title VI only against those districts where progress was minimal in both categories. Initial efforts to enforce the guidelines as written were abandoned.[95]

Student Desegregation

On March 10, 1966, the Director of Area II took the position that school districts in which fewer than 4 percent of the Negro school children transferred in 1965–66, were required to achieve 12 percent student desegregation to comply with the guidelines.[96] He also determined that school districts in which no Negro children had transferred from segregated schools in 1965–66 would have to achieve 10 percent student desegregation.[97] Each of the three State chiefs in Area III originally took the position that the guidelines required a minimum of 15 percent pupil desegregation in school districts which had no desegregation at all during 1965–66.[98] It was reasoned that since districts with 8 or 9 percent desegregation in 1965–66 were required to reach 16 to 18 percent in 1966–67, and districts with 4 or 5 percent desegregation in 1965–66 were required to reach 12 to 15 percent in 1966–67, a standard of 15 percent for districts which had no desegregation in 1965–66 was not unreasonable.[99]

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[94] *Id.* at 181.13(d): "*Past Assignments. . . .* Patterns of staff assignments to initiate staff desegregation might include, for example: (1) some desegregation of professional staff in each school in the system, (2) the assignment of a significant portion of the professional staff of each race to particular schools in the system where their race is a minority and where special staff training programs are established to help with the process of staff desegregation, (3) the assignment of a significant portion of the staff on a desegregated basis to those schools in which the student body is desegregated, (4) the reassignment of the staff of schools being closed to other schools in the system where their race is a minority, or (5) an alternative pattern of assignment which will make comparable progress in bringing about staff desegregation successfully."

[95] The figures showing student and professional staff desegregation were supposed to be submitted to EEOP by April 15 or by 15 days after the close of the spring choice period, which was to end no later than April 30. In fact, many districts delayed their reports. In some instances the estimates were not submitted until shortly before the school year began. Although districts can be terminated for delays in reporting, EEOP did not do so on the ground that it was impractical (Seeley interview).

[96] Memorandum of telephone conversation between Mrs. Suzanne D. Price, Education Program Specialist, (EEOP), then South Carolina State chief, and W. Stanley Kruger, Education Program Specialist and Advisor, (EEOP), then Area Director, Area II, March 10, 1966; see also Kruger interview; staff interview with Francis V. Corrigan, Education Program Specialist, (EEOP), then the Georgia State chief, Sept. 7, 1966.

[97] *Ibid.*

[98] Staff interviews with Lloyd R. Henderson, Education Program Specialist, (EEOP), then Mississippi State chief, Sept. 9, 1966 (Henderson interview); Carlyle C. Ring, Civil Rights Advisory Specialist, (EEOP), then Tennessee State chief, Sept. 12, 1966 (Ring interview); and Lawrence E. Crowder, Civil Rights Advisory Specialist, (EEOP), then Alabama State chief, Sept. 12, 1966 (Crowder interview).

In July, Area II began to send out strongly-worded letters to school districts which had deviated substantially from the student desegregation standards of the guidelines as interpreted by the Director of Area II. Recipients of the letter were not confined to districts with minimal desegregation; the letters were sent to some districts with student desegregation estimates of over 8 percent.[100] Twelve school districts in Florida,[101] 37 in Georgia,[102] and 60 in South Carolina[103] received these letters.

The letter observed that the district's figures fell "substantially short" of the figure expected of it if its free choice plan was "to be considered effective in eliminating the dual school structure", and suggested that the district consider some additional steps to achieve a greater degree of integration before EEOP scheduled a full compliance review. A number of alternative steps were specified. Although the letter stated that these steps could include an additional free choice period, it said such a step "would probably be a futile gesture" without additional community support. It was suggested that "further faculty and staff desegregation beyond the minimum required by the . . . [guidelines] might be a most practical means of achieving additional student desegregation." The letter requested that EEOP be informed within 10 days of the additional steps that would be taken.[104]

Subsequently, however, the Director of Area II was instructed by Assistant Commissioner Seeley not to send out any more such letters and that he would have to proceed at a "measured pace".[105]

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[99] Ring interview.

[100] *E.g.*, Seminole, Florida (9.1%); Beaufort, South Carolina (8.8%); Charleston #2, South Carolina (8.7%); Richmond, South Carolina (8.4%).

[101] Staff interview with Mrs. E. Donna Urey, Program Assistant, (EEOP), March 31, 1967.

[102] Corrigan interview, March 31, 1967; Staff interview with David Gerard, Education Program Specialist, (EEOP), March 31, 1967.

[103] Memorandum from Mrs. Suzanne D. Price, Education Program Specialist, then South Carolina State chief, to W. Stanley Kruger, Education Program Specialist and Advisor, then Area Director, Area II, Aug. 11, 1966.

[104] See, *e.g.*, letter from W. Stanley Kruger to Desmond M. Bishop, Superintendent, Jefferson County Board of Public Instruction, Monticello, Florida, July 13, 1966.

[105] Kruger interview.

At about the same time, the Assistant Commissioner announced in a memorandum to all EEOP staff members that adequate progress for districts with less than four percent student desegregation in 1965–66 was "*not any fixed percentage*" (emphasis in original) and that "adequate progress for 1966–67 might be 10 percent or even less; . . . although 10 percent progress would be adequate."[106] EEOP thereafter devised three sets of form letters, designated Poor Performance Letters I, II, and III. Poor Performance Letter I notified a district that it had failed "to abide by the minimum requirements for desegregation under the guidelines," and that commitments of Federal financial assistance for all "new activities" of the district were being deferred pending resolution of the matter.[107] This letter went to certain districts which had estimated the percentage of Negroes who would transfer from segregated schools at from zero to 2 percent *and* which scored less than .75 on a Faculty Desegregation Index—an index of progress in the desegregation of professional staff.[108]

Under a policy announced by a representative of the Secretary's staff at an Area Directors' meeting on August 11, 1966, all such districts were to be deferred.[109] In fact, however, because EEOP did not believe its administrative machinery could handle all such districts at the same time, only a fraction of the districts received letters in August.[110] Inevitably, like school districts were not treated alike. For example, in Mississippi, Coffeeville Consolidated School District, with no desegregation, was deferred in August 1966, but Bay St. Louis Municipal Separate School District and Wayne County

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[106] Memorandum dated July 29, 1966.

[107] On Dec. 27, 1965, the Attorney General sent to agencies having responsibilities under Title VI of the Civil Rights Act of 1964 guidelines in which he stated that where an assurance or plan of desegregation required by agency regulations has not been filed or fails to satisfy the regulations, action should be deferred on the application for funds pending prompt initiation and completion of Section 602 procedures. The guidelines also stated that where an otherwise adequate assurance or plan has been filed, but prior to completion of action on the application the head of the agency has reasonable grounds to believe that the representations as to compliance are not being honored, the agency head may defer action on the application pending prompt initiation and completion of Section 602 procedures.

[108] Kruger interview; Price interview; staff interview with John Hodgdon, (EEOP), then Acting Director, Area II, March 21, 1967. See also Memorandum to all Area Directors dated Aug. 11, 1966. An index of 1 meant that the school system had the equivalent of one full-time teacher for every school in the system in a school in which his race was in the minority. For a complete explanation, see *infra*, p. 32.

[109] Memorandum to all Area Directors, dated Aug. 11, 1966.

[110] Staff interview with Everett A. Waldo, Program Assistant, (EEOP), then Administrative Assistant to Richard L. Fairley, Education Program Specialist, then Acting Area Director, Area III, Aug. 16, 1966.

School District, also with no desegregation, were not deferred until February 1967.[111]

Poor Performance II Letters generally were sent to districts which had estimated the percentage of Negro students transferring from segregated schools at from 2 percent to 4 percent and which scored less than .75 on the faculty index.[112] EEOP considered these districts to have "performance problems just short of requiring deferral".[113] The letter suggested that further action by the district would be necessary to avoid enforcement proceedings. Poor Performance Letter III generally was sent to districts which estimated the percentage of Negro students transferring from segregated schools at more than 4 percent (but below the guideline expectations) and which had a faculty index of less than .75.[114] This letter did not threaten any enforcement action but simply expressed dissatisfaction with the district's progress.

Examination of the enforcement proceedings actually conducted or brought by EEOP under section 602 of the Civil Rights Act of 1964 reflects the substantial administrative dilution of the standards contained in the guidelines.

From the enactment of Title VI in July 1964 to the beginning of January 1966, no school district was cited, *i.e.*, received a notice of hearing, for failure to comply with the provisions of an accepted school desegregation plan.[115] All of the 65 proceedings filed prior to January 1966 were for failure to submit final court orders or acceptable plans or assurances. By November 1, 1966, only one school district, Baker County, Georgia, had been cited for unsatisfactory performance, although the number cited for failure to submit acceptable plans or assurances had risen to 138.[116] Within the next six weeks, however, an additional 45 districts were cited for failure to file and for the first time a substantial number, 57, were cited for poor performance under an accepted free choice plan.[117]

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[111] Staff interview with Miss Edna Ellicott, Educational Research and Program Assistant, (EEOP), April 20, 1967.

[112] Kruger interview; Price interview. See also Memorandum to all Area Directors, dated Aug. 11, 1966.

[113] Heading on Poor Performance II form letter; see also Seeley interview.

[114] Price interview. See also Memorandum to all Area Directors, dated Aug. 11, 1966.

[115] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States 1965–66*, at 50 (Feb. 1966).

[116] Letter, dated Dec. 19, 1966, from then Assistant Commissioner Seeley to Rep. L. H. Fountain (N.C.), Chairman, Intergovernmental Relations Subcommittee of the Committee on Government Operations, U.S. House of Representatives. Baker County subsequently was put back into compliance status although the percentage of its Negro students in formerly all-white schools was only 7%, while the guidelines standard for Baker County was 10%.

As of April 14, 1967, some 122 districts had been cited for poor performance. In 70 of these—a majority—the percentage of student desegregation (estimated or actual, depending upon when the district was cited) was less than 1 percent; in 22, the percentage was between 1 and 2 percent; in 11, between 2 and 3 percent; in 6, between 3 and 4 percent. Of the remaining 13 districts, the highest percentage was 6.7, except for districts which had transferred the bulk of their Negro students to another district and desegregated those few Negro students who remained.[118]

A review of the statistics compiled by Area II staff shows how far short of the standards of the guidelines this EEOP enforcement action fell. In Georgia (9 districts terminated, 12 cited), 112 of 180 school districts desegregating under supervision failed to meet the student desegregation standards of the guidelines; 92 met less than half the guidelines standard. In South Carolina (1 district terminated, 17 cited), 74 out of 108 fell short of the standard, 55 by more than half. In Florida (none terminated, 1 cited), 24 out of 48 did not meet the expectations of the guidelines, 4 by more than half.[119]

As previously noted, the guidelines stipulated that if a district fell substantially short of the percentage expectations of the guidelines, and the Commissioner determined that the district's desegregation plan was not operating fairly or effectively, "additional steps", or the adoption of another plan, would be required. EEOP's enforcement process, however, included neither a specification of further steps tailored to individual school districts deviating substantially from the expectations of the guidelines nor a requirement that the school district abandon free choice. These omissions were not based upon determinations that, considering the choices made and other available evidence, the plans involved were operating fairly and effectively to meet constitutional and statutory requirements. Rather, EEOP determined that it would not employ these provisions of the guidelines.

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[117] *Ibid.*

[118] A complete breakdown is given in Appendix II.

[119] Figures in parenthesis indicate number of school districts terminated and cited for poor performance as of May 23, 1967. Staff interview with Miss Marilyn Galvin, Education Research and Program Assistant, (EEOP), May 23, 1967. The other statistics are taken from figures supplied to EEOP by school superintendents in the selected States, and analyses made by EEOP staff in Area II.

Thus, the Director of Area II said that his staff did not press for school closings nor did it push alternatives to free choice "and certainly not over anyone's objection".[120] While an analysis of 13 Alabama "demand" letters—letters recommending means by which greater desegregation could be achieved—sent out before September 13, indicates that school closings, pairings, or the closing out of particular grades in particular schools were recommended in all but three exceptional instances, the Mississippi staff rarely suggested alternatives to free choice. While there were informal discussions of alternatives to free choice, an analysis of Mississippi "demand" letters sent out before September 8 reveals that the only recommendations made by Mississippi staff for adoption of alternative plans were a recommendation for the closing of one school jointly owned by two districts[121] and a recommendation for pairing of a white and a Negro school in another district.[122]

Neither the Mississippi nor the Alabama staff pressed for the adoption of nonracial attendance zones. As far as could be determined the establishment of geographic attendance zones was recommended during the summer in only one of the "demand" letters sent to Alabama school districts.[123] The policy for Mississippi was not to recommend adoption of nonracial geographic attendance zones in districts where nonracial zoning would have no chance of adoption because of the strong adverse attitudes of local school officials.[124]

Freedom of choice was tolerated even where it was clear that it was proving ineffective. During the summer Assistant Commissioner Seeley established an unwritten policy that if a district subjected to a compliance review requested a second choice period to put itself in compliance, the EEOP staff could not refuse the request even though a properly conducted spring choice period had proved fruitless.[125] This policy was followed even in instances where EEOP staff and school officials agreed that freedom of choice would not work in a district.[126]

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[120] Kruger interview.

[121] Carter School, jointly owned by Tishomingo County and Iuka Municipal Separate School Districts.

[122] In late Aug., the Mississippi staff adopted a policy under which letters sent out after Sept. 1st were supposed to contain a boilerplate provision mentioning that Section 181.11 "suggests" school closing and pairing as "in some cases . . . the most expeditious means of desegregation". On Oct. 6, the Mississippi State chief indicated that two districts recently had succeeded in being removed from the deferral list by closing out first grades in Negro schools. Henderson interview.

[123] Limestone County School District, Alabama. One Mississippi school district was supposed to have been asked to adopt an attendance zone plan, but the letter had not been sent out by Sept. 8.

[124] Henderson interview.

This tolerance of free choice was maintained notwithstanding the fact that many responsible officials within EEOP, including the Assistant Commissioner, believed that freedom of choice never would result in substantial desegregation in the South. The Director of Area I told Commission staff that the "arguments against freedom of choice are basically sound",[127] that it placed responsibility on the wrong people, and that it was not an "effective procedure" for desegregating schools.[128] Two of the three State chiefs in Area III stated that freedom of choice never would result in substantial desegregation in the South,[129] while the third thought that it would not work in rural areas.[130] Similarly, two of the State chiefs in Area II stated that freedom of choice would not work because it placed too great a burden on Negro parents and children,[131] and also because of the intransigence of State officials.[132] Assistant Commissioner Seeley flatly stated in an interview with Commission staff that in the Deep South States of Alabama, Georgia, Louisiana, Mississippi, and South Carolina, freedom of choice is not an effective method of desegregation.[133]

In testimony before a subcommittee of the House Judiciary Committee, Commissioner of Education Harold Howe II expressed his own doubts about the effectiveness of freedom of choice: "When our fieldworkers investigate free-choice plans which are not producing school desegregation they find that in almost all instances the freedom of choice is illusory. Typically, the community atmosphere is such that Negro parents are fearful of choosing a white school for their children."[134]

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[125] *Ibid.*

[126] *Ibid.*

[127] Staff interview with John Hope II (EEOP), then Area Director, Area I, Nov. 8, 1966.

[128] *Ibid.*

[129] Henderson, Ring interviews. Henderson believed that free choice could work only if EEOP insisted upon a certain percentage of desegregation as a standard requirement.

[130] Crowder interview.

[131] Corrigan interview.

[132] Staff interview with Mrs. Suzanne D. Price, Aug. 22, 1966 (Price interview).

[133] Seeley interview.

[134] Testimony of Harold Howe II, United States Commissioner of Education, *Hearings Before the Special Subcommittee on Civil Rights of the House Committee on the Judiciary*, 89th Cong. 2d Sess., ser. 23 at 24 (1966).

Faculty Desegregation

Like the student desegregation standards, the guidelines' standards for desegregation of professional staff suffered from dilution in practice—wholly apart from the fact that inadequate desegregation of professional staff typically was not deemed sufficient, standing alone, to trigger enforcement action.

EEOP adopted a policy, set forth in a memorandum from the Assistant Commissioner, as a "guideline to the guidelines".[135] The memorandum declared progress in professional staff desegregation to be adequate if as many teachers and other members of the professional staff were assigned to schools in which their race was in the minority as there were schools in the system. This standard (a faculty index of 1)—which was less stringent than any of the specific alternatives set forth in the guidelines—subsequently was diluted to a faculty index of .75, or three professional staff members for every four schools in the system.[136]

The standard, moreover, did not require the nonracial assignment of new professional staff members, even though the guidelines appeared to establish such nonracial assignment as a requirement. Indeed, the EEOP forms for reporting student and faculty enrollment and assignment, although they require a breakdown of the staff of each school by race, do not indicate the race of new personnel or the schools to which they are assigned.[137]

Nor did the standard require even token desegregation of the professional staff in each school. Under the standard, satisfactory desegregation of the professional staff would have been achieved in a 10-school district if 10 white professional staff members had been assigned to one Negro school, leaving all other schools wholly Negro or wholly white in professional staff composition. The standard adopted, moreover, did not in fact require significant progress "in the desegregation of teachers assigned to schools on a regular full-time basis", as the guidelines provided. Three types of staff counted in determining whether professional staff desegregation was adequate: full-time classroom staff, including principals; full-time non-classroom professional staff, and, part-time staff calculated in their "full-time equivalent". For example, if one part-time teacher taught two days a week and another taught three days a week, together they would be counted as one teacher. Driver-training instructors were counted, as well as librarians, school nurses, and other administrative personnel.

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[135] Seeley interview.

[136] See Memorandum to All Area Directors dated Aug. 11, 1966.

[137] The forms prepared for collecting the spring, 1967, figures suffer from the same fault. The Department of Health, Education, and Welfare intends to remedy this defect—which it attributes to an oversight—in the forms to be submitted in the fall of 1967. Staff interview with then Deputy Assistant Commissioner, (EEOP), Harold B. Williams, April 21, 1967.

Office of Education figures show that relatively few school districts operating under accepted 441–B assurances, *i.e.*, assurances by districts previously submitting plans that they would abide by the requirements for desegregation plans contained in the 1966 guidelines, actually satisfied even the modest professional staff desegregation standard established by EEOP purportedly to implement the guidelines. In Alabama only three districts of 48 operating under accepted 441–B assurances achieved a faculty index of .75, while 33 achieved a ratio of less than .50 and 19 had no desegregation of professional staff. In South Carolina 15 out of 93 districts achieved a faculty index of .75, while 56 districts achieved less than .50, and 10 had no desegregation.[138]

In Alabama there were 45 districts which did not meet the EEOP standard, yet only 17 of these school districts had been cited as of April 1967.[139] There were 58 districts in Mississippi which did not meet EEOP's standard, but only 23 districts had been cited. Seventy-eight South Carolina districts did not meet the standard, but only 10 had been cited.[140]

B. Implementation of Other Guidelines Requirements

EEOP's departure from the standards set forth in the guidelines was not limited to the standards governing student desegregation and desegregation of professional staff.

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[138] Calculations made by Commission staff. These figures reflect only those school districts operating under 441–B assurances which had submitted statistics to EEOP showing actual professional staff assignments for 1966–67. Where EEOP staff had questions about the accuracy of a school district's figures, that district was not included in the compilation. The figures were available, however, for the large majority of the 441–B districts in Alabama, Mississippi, and South Carolina.

Of the 63 school districts visited by Commission staff, only 31 reported any desegregation of professional staff (data was not collected for two school districts). Of this 31, however, only 15 reported any desegregation of full-time classroom teachers of academic subjects. The remaining 16 districts had desegregation only of physical education or driver training instructors, home economics, vocational agriculture or industrial arts teachers, librarians, nurses, or teachers engaged in remedial instruction.

[139] Department of Health, Education, and Welfare, (EEOP) *Status of Compliance, Public School Districts, Seventeen Southern and Border States* (Report No. 5, April, 1967).

[140] *Ibid.*

Section 181.15 of the guidelines provides that where a school system maintains a small, inadequate school for one race, and the facilities, teaching materials, or educational program available to its students are inferior to those generally available in the schools of the system, the school authorities normally will be required immediately to assign such students to other schools in order to discontinue the use of the inferior school.

Although, from the statistical information it received from desegregating school districts, EEOP was able to determine the size of each school in the system, it did not require submission of information, such as the age of each school building, the type of equipment in each school (*e.g.*, how the building was heated, whether it had outside toilets), or the availability of instructional material and equipment (*e.g.*, whether the school had a library, science laboratory or gymnasium) which would have provided a basis for at least a preliminary judgment concerning the adequacy of the school. Such information could be obtained only from an on-site visit. Although compliance reviews did include on-site evaluations of school buildings, such reviews typically were conducted only in those districts in which progress in student and professional staff desegregation was minimal.

Even where EEOP, after a compliance review, determined that a school was inadequate as well as small, it did not—contrary to the guidelines—"normally" require the school district to close the school. EEOP's efforts in this regard were confined largely to *suggestions* for school closing. Demands for school closing were rare.[141] The director of Area II said he would not "press" a district to close schools.[142]

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[141] There were exceptions. At the end of March 1966, the Assistant Commissioner sent the superintendent of the Weakley County Tennessee School District a letter which criticized the manner in which the system conducted its 1965 choice period. The letter noted that "the results of the 1965 choice procedure and the attitudes of the community to school desegregation make it doubtful that a plan based on free choice of schools is an effective and adequate means of eliminating the dual structure of the Weakley County Schools". Because EEOP staff had found that the all-Negro schools were inferior and that there were no administrative obstacles to closing the three most inadequate ones, the letter concluded that freedom of choice was inappropriate as well as ineffective. Thus, the letter said that "the school district should work out, with appropriate local groups, an acceptable alternative plan, following the requirements of the revised desegregation guidelines". Such alternative plan, the letter continued, should include provisions for closing four Negro schools; in the alternative it was suggested that one be used as a school for all pupils in the system.

Thereafter the school system did close four Negro schools and adopted a geographic zoning plan. The total Negro student body (414 students) has been integrated into the formerly all-white schools.

[142] Kruger interview.

A number of school districts desegregating under the supervision of EEOP adopted geographic zoning plans. EEOP, however, did "little with geographic plan districts".[143] In some cases EEOP did not even receive the required maps showing the zones.[144] EEOP neither requested nor received maps showing the racial composition of residential areas covered by the zones. According to the Assistant Commissioner, EEOP "suspected" many districts using geographic zoning of having gerrymandered their districts, but had not yet "gotten" to these districts.[145]

Section 181.14(b)(1) of the guidelines provides that a student attending a school for the first time on a desegregated basis "may not be subject to any disqualification or waiting period for participation in activities and programs, including athletics, which might otherwise apply because he is a transfer student". The Mississippi and Alabama chiefs were faced with "anti-raiding" regulations of statewide high school athletic associations which made students changing schools within the same school district ineligible for athletic competition for one year. The Mississippi chief prohibited school districts from applying the regulation to Negro students transferring to previously all-white schools. The Alabama chief, on the other hand, failed to follow the guidelines. In at least one instance, he permitted a school district to continue to require Negro students transferring to previously all-white schools to apply to the State Athletic Association for a special waiver of the athletic association rule.[146]

Section 181.51 of the guidelines provides that where transportation generally is provided, buses must be routed "to the maximum extent feasible so as to serve each student choosing any school in the system". This requirement was not enforced. Thus, a three-judge Federal District Court found on March 22, 1967, that in Alabama "there is duplication and overlapping of bus routes in the school bus transportation provided in practically every area of the State to permit white children to avoid attending desegregated schools closer to their homes; further, this system has been and is used to transport Negro children living near white schools to Negro schools miles away".[147] Dual bus routes were found in six of the school districts visited by Commission staff. One of the districts was in Alabama (Marengo County); two in Georgia (Crisp County and Dooly County); one in Tennessee (Haywood County); one in Louisiana (Ascension Parish), and one in Mississippi (Issaquena-Sharkey Consolidated School District). In Dorchester County, South Carolina School District No. 1, children were segregated by race within buses. Crisp County, Georgia and Dorchester County School District No. 1—both 441–B districts—had not been cited as of April 14, 1967.[148]

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[143] Seeley interview.

[144] Section 181.35(a). The section provides that the map "need not be of professional quality".

[145] Seeley interview.

[146] Crowder interview.

C. Treatment of Districts Submitting Form 441 Assurances

Even though, in three of the Border States, more than one-third of the Negro students attend all-Negro schools, EEOP did not look beyond the certification of a State superintendent in the border States that a district submitting a Form 441 assurance in fact did "not maintain any characteristic of a dual school structure". Visits to 441 districts were not "routinely" conducted.[149] The guidelines do not require the submission by 441 districts of data indicating student and professional staff composition of each school by race. While, at EEOP's behest, such information has been *requested* of school districts since October 1966 by the National Center for Educational Statistics—a separate branch of the Office of Education under an Assistant Commissioner—very few districts have submitted such information. And what information is available EEOP believes to be unreliable.[150]

D. Tabulation of Desegregation Information

The 1966 guidelines required every school district to submit, by April 15 or within 15 days after the close of the spring choice period, anticipated fall attendance by race for each grade of each school. The purpose of this requirement was to enable EEOP to review in advance, and appraise the adequacy of, the projected performance of each school district for the following school year. The theory was that where the projected performance was not adequate, corrective steps called for by the guidelines could be taken prior to commencement of school in the fall.

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[147] *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 474 (M.D. Ala. 1967).

[148] Marengo County has been cited for failure to file an assurance. Ascension Parish and Sharkey-Issaquena school districts are under court order.

[149] Seeley interview.

[150] Staff interview with Robert L. Brown, then Program Manager (EEOP), April 4, 1967 (Brown interview). The difficulty in getting accurate readings of the figures applies to 441-B districts, as well as districts in 441 status. EEOP officials maintain that the Center has not put sufficient resources into processing the information collected for EEOP. Seeley interview; Brown interview.

The techniques for organizing and recording the required information, however, were faulty, and inefficient. In its 1968 Manpower Estimates, EEOP itself noted that "the development and maintenance of a sound series of reports and statistics has been a problem which has plagued this program for all its days". The initial problem was the slowness with which the spring estimates of student and faculty desegregation were submitted. As these figures became available, they were routed both to Title VI enforcement staff and then to the National Center for Educational Statistics. At this point, the machinery broke down. The information collected never was usably totaled, analyzed, and returned to EEOP staff. Thus, it was necessary for EEOP staff to hand-tabulate all the forms submitted. Virtually all EEOP staff with whom the situation was discussed complained about not being able to rely on machine tabulations and about inaccuracies in these tabulations when they finally became available.[151]

In some areas such information nevertheless was kept in an orderly manner and was readily available and up-to-date in a form which, for example, enabled the staff to compare the relative rates of desegregation of different districts within a State. Summer students on the Alabama staff early in the summer prepared a wall chart which was kept up to date, and near the end of the summer prepared work sheets presenting the relevant data obtained from school districts in readable summary form. These items assisted greatly in planning field trips and promoted consistency in enforcement.[152] Area II staff prepared charts showing the estimated student desegregation for each 441–B district, along with the guideline percentages, and the amount of faculty desegregation in the district.

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[151] See, *e.g.*, staff interview with Miss Caroline F. Davis, Civil Rights Advisory Specialist (EEOP), and Miss Deidre Parker, Education Research and Program Assistant (EEOP), Oct. 13, 1966; Kruger interview.

[152] Staff discussions with James Conahan and Daniel Joseph, law students assigned to the Alabama staff of EEOP.

In other areas the information neither was kept up to date nor maintained in an organized way. As a result, compliance reviews and enforcement proceedings often were not planned in a rational or consistent manner.

For example, because of manpower limitations EEOP determined that it could not proceed at once against all the school districts performing unsatisfactorily and that it would begin with the worst performers and work its way up toward districts nearer guideline expectations.[153] Because the Mississippi statistics neither were kept up to date nor maintained in accessible form, one Mississippi county which had a relatively high student desegregation percentage for Mississippi was "deferred" at the same time as the lowest performers. All relevant information about this district was in the EEOP files at the time the district was deferred out of turn.[154] Similarly, of the 18 school districts in Mississippi scheduled for deferrals early in September because of low rates of desegregation, only seven were visited by compliance teams during the summer, when EEOP's skeleton staff was bolstered by law students.[155] Yet visits were made during the summer to other Mississippi districts with higher rates of desegregation.

At the request of the staff of the Secretary, made in December 1966, all State Staffs were directed to prepare charts to reflect the compliance status of all school districts. As of March 1967, however, EEOP did not have its information on student desegregation compiled in such a way as to answer a Commission query as to how many school districts in fact met the percentage expectations set forth in the guidelines.

E. Field Visits

Under an administrative policy, before a termination hearing was held, a field visit to the school district had to be conducted. In its 1966 survey, the Commission noted that because EEOP staff was limited, there were not enough people both to handle the required paper work and to undertake the field investigations necessary to evaluate properly the assurances and plans, and to determine whether school districts were following them.[156]

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[153] Staff interview with F. Peter Libassi, Special Assistant for Civil Rights to the Secretary of Health, Education, and Welfare, Jan. 18, 1967 (Libassi interview).

[154] Superintendent's report in EEOP file.

[155] Under EEOP's then-existing procedures, the remaining 11 districts were required to be visited eventually, but fall and winter visits were conducted with sharply depleted staff.

When the guidelines were revised, school districts which already had submitted plans were allowed to amend them to conform to the new guidelines merely by submitting a 441–B assurance.[157] This eliminated the need for plan-by-plan review and permitted EEOP staff to spend more time in the field. The following chart shows the number of school districts visited in each of the Southern and border States during 1966:[158]

	State	*Districts Visited*	*Total No. of Districts Submitting 441-B Plans*
Area I	Kentucky	*8*	*30*
	Delaware	*2*	*28*
	Maryland	*17*	*18*
	North Carolina	*29*	*137*
	Virginia	*29*	*100*
	West Virginia	*3*	*5*
Area II	Florida	*17*	*48*
	Georgia	*80*	*180*
	South Carolina	*35*	*108*
Area III	Alabama	*51*	*90*
	Tennessee	*26*	*75*
	Mississippi	*49*	*113*
Area IV	Arkansas	*46*	*183*
	Louisiana	*0*	*5*
	Oklahoma	*47*	*91*
	Texas	*120*	*536*

Many of these visits occurred during the summer, when the EEOP staff was supplemented by large numbers of students.

Limitations of staff and funds restricted the number of field investigations which could be undertaken. In determining which districts should be subjected to compliance reviews, complaints were considered along with the percentage of student desegregation in the district. Not every complaint was investigated.[159] Nor were spot-checks conducted in the absence of complaints and regardless of the percentage of student desegregation to determine whether school districts were complying with other provisions of the guidelines.

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[156] U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States 1965–66,* at 25–26 (Feb. 1966).

[157] The assurance is essentially a promise by the applicant for Federal financial assistance that it will comply with the revised guidelines. The assurance form calls upon the applicant to set out the type of desegregation plan adopted by it. If the plan was accepted by the Commissioner of Education prior to the submission of the 441-B, the assurance contains a promise to modify the plan to the extent necessary to comply with the requirements of the revised guidelines.

[158] Seeley letter. Some districts were visited more than once. A distinction was maintained between compliance reviews and technical assistance visits. A compliance review, which sometimes was spread over more than one on-site visit to a school district, included interviews with school officials, a review of forms, notices, and other documents relating to the operation of a district's desegregation plan, interviews with Negro parents and school children, and an evaluation of the physical facilities of all the schools in the system. This review formed the basis for the "demand" letters and enforcement action. Technical assistance visits were made for the purpose of helping school officials cope with problems resulting from school desegregation. The figures shown here cover both kinds of field trips. Williams interview, May 29, 1967.

Many districts in which student desegregation failed to meet the standards set by the guidelines were not visited. Of the 44 districts in Mississippi with a student desegregation rate of 2 percent or less, EEOP had visited only seven by the end of August.[160] Planned August visits to an additional eight districts, four with a desegregation rate of less than 2 percent, were canceled because of a lack of time and money.[161]

Among the relatively few field visits undertaken were many which were conducted too late to produce any changes in the practices of school districts for the 1966–67 school year. In Mississippi only one district was visited in June; the rest were visited in July and August. For example, Pontotoc Municipal Separate School District was not visited until August 18–22. A "demand" letter was not sent until September 7. As of September 8, letters had not yet been sent to eight school districts in Area III visited in July and August.[162]

Similarly, of the 28 Alabama districts reporting a desegregation rate of 2 percent or less, only 10 were visited during the summer.[163] Scheduled visits to eight school districts were canceled during August.[164] Three of these districts had reported student desegregation of 2 percent or less and five had no faculty desegregation.[165] Compliance review trips to Alabama did not begin until July and often were planned too late in the summer to effectuate changes. As in Mississippi, the result was that letters frequently were sent too late to accomplish their objective. Of 13 letters which went to districts visited during July and August and which were examined by Commission staff, at least five did not leave EEOP before August 31.

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[159] One Area Director stated that he had more complaints from a single school district than he had staff for the entire state, and that most complaints were treated as merely a source of information for EEOP. Kruger interview. Another, interviewed in Nov. 1966, said that until "very recently" his staff had concentrated on the district rather than the complaint. Hope interview.

[160] Staff review of EEOP files.

[161] Henderson interview.

[162] Staff review of EEOP files.

[163] *Id.*

[164] Henderson interview.

[165] Staff review of EEOP files.

While failure to make more visits was attributable in part to inefficiency and inadequate recording of statistical information, insufficient staff and funds played a large role.[166]

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[166] According to Area II staff (the bulk of whose field visits also did not begin until July), additional time was needed to train summer employees before sending them into the field. See, *e.g.*, Price interview.

7. DEPARTMENT OF JUSTICE LITIGATION

Prior to 1964, the Department of Justice lacked statutory authority to bring suits to compel school districts to desegregate. Title IV of the Civil Rights Act of 1964 authorized the Attorney General to bring a school desegregation suit when he receives a meritorious written complaint of discrimination from a parent of the alleged victim and he certifies that the complainant is unable on his own to commence and maintain legal proceedings.[167] Title IX authorized the Attorney General to intervene in existing lawsuits brought by private parties to secure public school desegregation if he certifies that the case is of general public importance.[168] The Department of Justice also has appeared in school desegregation suits as *amicus curiae*, or friend of the court.

Since passage of the Act, participation by the Civil Rights Division of the Department of Justice in school desegregation litigation has reached major proportions. By March 7, 1967 the Department was a participant in 109 cases involving school desegregation.[169]

Whether the Department of Justice will commence a suit depends on whether the prerequisites of the statute, that is, receipt of a written meritorious complaint of discrimination by a parent unable to bring his own suit, are fulfilled. A number of criteria govern the discretionary intervention of the Department in pending litigation. The Department weighs such factors as whether the litigation is a key case which will set important precedent, whether it raises difficult problems of proof, whether it involves representative problems such as rural desegregation, urban desegregation, or faculty

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[167] 78 Stat. 248 (1964), 42 U.S.C. 2000c-6 (1964).

[168] 78 Stat. 266 (1964), 42 U.S.C. 2000h-2 (1964).

[169] Department of Justice, *Status Report of School Cases*, March 9, 1967. The Department's participation in new school cases, by year, has been:

1963	1964	1965	1966	1967
1	2	26	73	7 (Jan. 1-March 9)

desegregation, and whether it is the first such case before a particular judge.[170] Special attention also is given to districts whose Federal funds have been terminated for failure to comply with Title VI of the Civil Rights Act of 1964 and the regulations promulgated thereunder.[171]

As of January 1967, the Department took the position that freedom of choice is a permissible means of assigning students providing that the requirements of the guidelines are carried out and are effective. In at least one instance the Department alleged that as a result of community hostility in a school district, Negroes in the district had been denied a truly free choice of schools during the April choice period for the 1966–67 school year.[172] The Department consented, however, to a preliminary injunction permitting the school board to retain freedom of choice providing that a second 1-week choice period was conducted.[173] The case has not been heard on its merits.

One of the cases in which the Department has participated is *United States* v. *Jefferson County Board of Education.*[174] Prior to December 1966, court orders obtained against school boards varied considerably in the requirements they imposed upon the districts covered and from the Office of Education guidelines. As a result, a school district resistant to desegregation was able to avoid meeting the guidelines requirements and still retain Federal funds by complying with a court order more permissive than the guidelines.[175] In the *Jefferson County* case, the Department successfully sought to obtain a uniform and detailed desegregation decree of general application—substantially incorporating the standards of the guidelines—for use in all districts operating free choice plans under court order within the Fifth Circuit. Since the *Jefferson County* decision the Department has made an effort to bring more permissive pre-existing court orders up to the stricter standards of the *Jefferson County* decree.

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[170] Interview with John Doar, Assistant Attorney General in charge of the Civil Rights Division, Department of Justice, Jan. 10, 1967.

[171] *Ibid.*

[172] *United States* v. *Calhoun County Board of Education*, C.A. No. WC6637, N.D. Miss., filed Aug. 12, 1966.

[173] *Id.*, order dated Aug. 25, 1966.

[174] 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir., March 29, 1967.

[175] See *United States* v. *Jefferson County Board of Education, supra* note 174.

In *Lee* v. *Macon County Board of Education,*[176] the Department of Justice participated in litigation resulting in an order which, among other things, directed Alabama State officials to stop paying private school tuitions. The order also required the State Superintendent of Education to notify all school systems in Alabama, not already under court order, to adopt a desegregation plan similar to that required in the *Jefferson County* case within 20 days, and to withhold approval of school construction sites which did not, "to the extent consistent with the proper operation of the school system as a whole", further the disestablishment of public school segregation.

The Department also participated in litigation to prevent States from paying tuition for students attending private schools set up to circumvent public school desegregation in Louisiana,[177] Mississippi,[178] North Carolina,[179] and South Carolina.[180] The North Carolina tuition grant statute was held unconstitutional on April 4, 1966. On March 12, 1966, the South Carolina State Board of Education was restrained from making tuition grant payments until further decision in the case.

These and other developments in the law are discussed in detail in Appendices VI and VIII of this report.

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[176] 267 F.Supp. 458 (M.D. Ala. 1967).

[177] *Poindexter* v. *Louisiana Financial Assistance Commission,* C.A. No. 14683, E.D. La. (leave to intervene granted Oct. 20, 1966).

[178] *Coffey v. State Educational Finance Commission,* C.A. No. 3906, S.D. Miss. (leave to intervene granted March 31, 1966).

[179] *Hawkins v. North Carolina State Board of Education,* 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966) (leave to intervene granted Jan. 18, 1966).

[180] *Brown* v. *South Carolina State Board of Education,* C.A. No. 1655, D.S.C. (leave to intervene granted Nov. 5, 1965).

8. FREE CHOICE PLANS IN OPERATION

Between September 1966 and January 1967, Commission staff visited 63 school districts in 61 counties in 14 Southern and border States. They interviewed 936 persons, including school superintendents or their attorneys, principals, school teachers, Negro school children, and Negro parents.[181] The investigation focused on Negro families because it was designed to identify obstacles to free choice faced by Negroes.

Because identification of obstacles to free choice was the basic objective of the field investigation, a district was more likely to be chosen if (1) it had a sizable Negro population, and (2) either a low percentage of its Negro children was attending previously all-white schools during the 1966–67 school year based on figures reported by school districts to the Department of Health, Education, and Welfare or the Commission had received a complaint about the district within the previous year. A few districts with comparatively high student desegregation were visited. Finally, an attempt was made, especially in those States receiving relatively intensive study, to obtain a rough geographic distribution and to visit urban as well as rural school districts.

A. Free Choice Plans—Extent of Use

Free choice plans are favored overwhelmingly by the 1,787 school districts desegregating under voluntary plans. All such districts in Alabama, Mississippi, and South Carolina, without exception, and 83 percent of such districts in Georgia have adopted free choice plans.[182]

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[181] The Commission staff interviewed 365 Negro children attending formerly all-white schools, and 237 parents of Negro children attending such schools. In each district the staff also interviewed Negro and white school principals and teachers, Negro children attending all-Negro schools, parents of children attending such schools, and community leaders. A list of the districts visited and a description of the type of plan in effect and the extent of desegregation in each, appears in Appendix III to this report.

Commission staff visited numerous school districts which had elected to operate under a freedom of choice plan even though it required busing children further than would have been required had children been assigned on the basis of nonracial attendance zones. In the Beauregard Parish, Louisiana school district, for example, all Negro high school students in the Merryville and Bancroft areas are bused to De Ridder, 20 miles from Merryville and more than 30 miles from Bancroft, despite the fact that high schools are located in Merryville and in Fields, which is less than 10 miles from Bancroft. In the North Panola County school system in Mississippi, there are high schools in each of the towns of Sardis and Como, which are about five miles apart. Nevertheless, white high school students living in Como are bused to school in Sardis and virtually all Negro high school students living in Sardis are bused to school in Como. In the Somerset County school system in Maryland all the Negro students living in the Deal Island area are bused more than 10 miles (some as far as 19 miles) to attend a school in the town of Princess Anne, even though a school for grades 1–12 is located on Deal Island. Similarly, a large percentage of the Negro high school students living in Marion are bused to Crisfield, more than five miles away, even though there is a high school in Marion.

The great majority of districts desegregating under court order also are employing freedom of choice. Of the 160 school desegregation suits which had been brought within the Fifth Circuit prior to March 6, 1967, some 129 had resulted in orders embodying free choice plans; only 11 districts under court order in the Fifth Circuit used geographic zoning in whole or in part.[183] Because free choice so predominates in the areas of greatest resistance to desegregation, the staff investigation concentrated on free choice districts. Most of the districts visited were in small towns and rural counties, although a number of city school systems also were surveyed.[184]

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[182] Seeley letter.

[183] Revised Vol. I, Appendix to Briefs for the United States, *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir., March 29, 1967.

[184] According to the 1960 census, in 1960 slightly more than half of the Negro children in the Southern States between the ages of 5 and 19 lived in rural areas or towns with populations of less than 2,500. In Arkansas, Mississippi, North Carolina, and South Carolina, more than 60 percent of the Negro children lived in such areas. The percentage of Negro children living in rural areas undoubtedly has decreased in the seven years since the census was taken.

	Total Nonwhite Population Urban and Rural (Ages 5-19)	Total Nonwhite Rural Population (Ages 5-19)	Percent
Alabama	344,543	164,233	47.7
Arkansas	134,941	81,136	60.1
Florida	267,092	70,260	26.3
Georgia	386,414	186,347	48.2
Louisiana	357,914	151,853	42.4
Mississippi	339,817	245,455	72.2
North Carolina	422,264	277,502	65.7
South Carolina	323,296	227,384	70.3
Tennessee	183,960	59,325	32.2
Texas	366,744	103,930	28.3
Virginia	263,424	135,362	51.4
	3,390,409	1,702,787	50.2

B. Obstacles to Exercise of Free Choice

In rural areas school districts typically are large, often covering entire counties, and children customarily ride buses considerable distances to attend centrally located consolidated schools. In such circumstances, patterns of racial segregation in housing have no effect on the racial composition of the schools. Nevertheless, except for one white child in Columbia, S.C. who chose a Negro school, all white children in the districts visited continued to choose formerly all-white schools, and the vast majority of the Negro children chose to attend all-Negro schools.

Earlier Commission studies of Southern school desegregation have described patterns of misconduct by private citizens and public officials which have tended to reduce the number of Negro children choosing to attend previously all-white schools.[185] Instances of similar misconduct—including intimidation by violence and economic reprisal, and improper acts of school authorities and other public officials—with similar results, were found in the present study.

Intimidation by Violence

Clay County, in Northeastern Mississippi, is roughly 45 miles east of Grenada. In the Clay County School District there are two 12-

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[185] See *e.g.*, U.S. Commission on Civil Rights, *Survey of School Desegregation in the Southern and Border States 1965–66* (Feb. 1966); 1964 Staff Report, *Public Education.*

grade schools: Beasley High School, attended by 600 Negro children and Clay County High School attended by 300 white children and 6 Negro children.[186] Until April 17, 1967, when the district was placed under a court order,[187] it was desegregating under a 441–B freedom of choice plan. In the words of the attorney representing the school superintendent, the district had selected a free choice plan and fulfilled all the technical requirements for compliance "because we always figured, since it was rural, not enough [Negroes] would sign on to make any trouble."[188]

The principal of the Clay County School suggested in October 1966, that so few Negro children had chosen his previously all-white school because of the superior facilities of the newer, larger, all-Negro school.[189] He knew of no trouble in the county which would have deterred Negro children from attending previously all-white schools. Neither did the school superintendent nor his lawyer.[190] But the parents of a 12-year-old Negro boy in the seventh grade of one of the schools under the superintendent's supervision reported that just before school opened:

> "White folks told some colored to tell us that if the child went, he wouldn't come back alive or wouldn't come back like he went."[191]

School registration for the 1966–67 school year took place August 26, 1966. On that day the boy was registered in a formerly all-white school. During the night of August 26, the family reported, three shots were fired from a passing automobile into the front of their small frame house. A sequel occurred on the night of September 24, when nine shots were fired through the family's automobile which was parked in front of the house. On the night of October 15, 10 days before the staff visit, three more shots struck the car.[192]

The mother of two of the children attending the formerly all-white school reported that she had received a notice in her mailbox on August 29 saying that she had three days to remove her children from the white school "or burn on the cross—KKK."[193] Parents of another one of the children received a similar notice.[194] The mother of another Negro child, who had filed her choice form electing the formerly all-white school, said she had changed her mind after being told that the brother of her white landlord had threatened to remove her child from the school bus and whip him if he attended the white school.[195]

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[186] Although these schools accommodate grades 1–12, they nevertheless are called "high schools."

[187] *Dean* v. *Clay County Board of Education*, C.A. No. EC 6663, N.D. Miss., April 17, 1967.

[188] Staff interview with Harvey S. Buck, attorney representing the Clay County School Board, and Superintendent W. G. McCuiston, Oct. 26, 1966.

[189] Staff interview with Mr. Billie Q. Caples, Principal, Clay County Vocational High School, Oct. 26, 1966.

[190] *Ibid*; Buck and McCuiston interview *supra.*

[191] Staff interview, Oct. 25, 1966.

[192] *Ibid.* According to the Department of Justice, there were two subsequent shooting incidents, making a total of five. Letter dated June 27, 1967.

In Chickasaw County, Mississippi, just to the North, desegregation was taking place under a 441–B free choice plan. Of the 1,255 Negro children in the county school system, three chose to attend a previously all-white county school.[196]

The Negro children who chose to attend a previously all-white county school were brothers and sisters, aged six, seven and nine. Their choice forms were filed during the spring choice period, which ended May 17th. The family reported that, in the middle of June, they received anonymous telephone calls demanding that the father change his mind.[197] The first day of school attendance was to be September 1, 1966. Between 2:30 and 3:00 on the morning of that day shots were fired through the picture window of the family's home. The parents placed the children on mattresses on the floor to give them the protection of the brickwork which covered the lower half of the exterior walls. On October 9, at about 12 midnight, more shots were fired into the living room. Again the children's mattresses were moved to the floor. Commission attorneys interviewed the family and examined the gunfire damage on October 26, 1966. The father since has reported to the Commission that the living room window again was shot out on November 8, 1966, shortly before 8 p.m.[198]

Asked if he knew of any violence which might have deterred Negro children from choosing white schools, the school superintendent at first said that he did not. Subsequently, however, he mentioned the shooting as evidence of the kind of community opposition facing the school board in its desegregation efforts.[199]

The Sharkey-Issaquena Line Consolidated School District, which encompasses two counties in the Mississippi Delta region, began school desegregation under a freedom of choice plan pursuant to court order in July of 1965.[200] Although the 1966 Guidelines contained a provision that children in grades not yet covered by free choice during the 1966–67 school year would be permitted to transfer to schools which their brothers or sisters attended, or which offered courses not available in the schools to which they had been assigned,[201] the order governing Sharkey-Issaquena did not have such a provision in September of 1966. Fifty-five Negro children nevertheless sought such transfers unsuccessfully.[202] On September 22, 1966, Commission attorneys visited the district. Subsequent newspaper accounts reported that on the night of November 24, 1966, shots were fired at the house of Mrs. Lillie Willis. Jennie Joyce Willis, 13, one of the children who had sought to transfer, was hit in the face by the shotgun blast and lost her right eye.[203]

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[193] Staff interview, Oct. 25, 1966.
[194] Staff interview, Oct. 25, 1966.
[195] Staff interview, Oct. 25, 1966.
[196] Staff interview with Superintendent Willie Mason Foster, Oct. 28, 1966.
[197] Staff interviews, Oct. 26, 27, 1966.
[198] Staff interviews, Oct. 26, 27, 1966; Commission complaint file number 6732.
[199] Foster interview.

Edgecombe County, North Carolina, is desegregating its schools under a 441–B free choice plan. On December 21, 1966, a Commission staff member interviewed a Negro couple whose son and daughter were attending a formerly all-white school in Edgecombe County. They stated that 12 days earlier their house had been struck by gunfire.[204]

In Williamsburg County, South Carolina, 109 Negro children were attending six formerly all-white schools in September, 1966.[205] A Negro family with five children attending such schools reported that a shot had been fired into their house on September 26. Commission attorneys visited the family the following day. A window next to a porch on which the mother and children had been seated at the time of the shooting was smashed. One of the children said that a white schoolmate had threatened to castrate him. Another already had decided not to return to the formerly all-white school next year.[206]

A Negro family in Panola County, Mississippi, had sent one child to a previously all-white school in the 1965–66 school year, and three more in the fall of 1966. They reported that one night shortly after school opened in September, three rifle shots had been fired through the walls of the bedroom in which two of the children slept.[207]

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[200] *Blackwell* v. *Issaquena County Board of Education*, C.A. No. 1096, S.D. Miss., July 22, 1965.

[201] 45 C.F.R. 181.71(b).

[202] Staff interview, Sept. 22, 1966.

[203] N.Y. Times, Nov. 30, 1966; Washington Post, Dec. 4, 1966.

[204] Staff interview, Dec. 21, 1966.

[205] Staff interview with Superintendent R. C. Fennell, Sept. 28, 1966.

[206] Staff field trip memorandum, Williamsburg County and Richland School District #1, Oct. 18, 1966.

To summarize, in six of the 63 districts chosen for study primarily because they had large Negro populations and had reported only slight progress under free choice plans, shots had been fired into the dwellings of Negro school children who previously had exercised their option to attend previously all-white schools. None of these districts was selected for study because of complaints of violence made to the Commission.[208]

Economic Coercion

In several of the counties visited during the Commission's 1965–66 study, there had been economic reprisal against families of Negro school children who had elected to attend previously all-white schools. This pattern continued during the 1966–67 school year.

In Panola County, Mississippi, 54 Negro children in the North Panola District were attending the previously all-white schools as of December 9, 1966.[209] A father of three of the children was a sharecropper who had been born and had lived for 41 years on a portion of a farm owned by a white landlord. He sent his children to the previously all-white school for the first time in September 1965. He stated that in December of 1965, after the cotton crop had been picked, he was informed that his labor would be needed no longer and that he was expected to move, although five other families were allowed to continue to farm the land.[210]

In the same county a Negro family of tenant farmers who had elected to send their children to a previously all-white school said they had received an eviction notice on September 21, 1966.[211] Another couple, dependent on picking cotton and on welfare payments, had signed choice forms in August 1966, to place one of their five children in the previously all-white school. They reported that the

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[207] Staff interview, Dec. 6, 1966.

[208] In four of the districts the victims contacted the FBI. The Department of Justice has advised the Commission that in each case the FBI conducted an investigation and developed information concerning possible culprits, but that in none of the cases is there yet sufficient basis for legal action. The Department told the Commission that the matters are not regarded as closed, since there is a possibility that further information will be developed, in which case appropriate action will be taken.

[209] Staff interview with Superintendent Sam D. Stafford, Dec. 9, 1966.

[210] Staff interview, Dec. 8, 1966.

[211] Staff interview, Dec. 7, 1966.

"welfare lady" had said the child "should go to colored school" and that the white landowner for whom they picked cotton had asked why the mother had chosen the white school, and refused to employ the couple after school began.[212]

In East Clarendon, South Carolina, School District No. 3, there are two 12-grade schools. One is all-Negro, the other all-white but for 10 Negro students. During the 1965–66 school year only one Negro attended the previously all-white school.[213] One Negro couple who lived and worked on a white man's farm placed two of their three children in the previously all-white school in the fall of 1966. According to the father, the employer "told me that he could go along with my political and civil rights activities but could not approve of the fact that my children were attending the integrated school. After learning of their enrollment he stated that I would have to leave the farm by December 1, 1966." The family moved out, the father and mother to temporary quarters, the children to their grandparents' house.[214]

Dooly County, Georgia, is operating under a 12 grade freedom of choice plan for the 1966–67 school year. Of the 2,100 Negro children in the school system, 19 attend the formerly all-white schools.[215] One, a 14-year-old boy, filled in his own form. His father reported: "He was in before I know. I came out of work, and saw him walking home [from the formerly all-white school] and that Monday night the man came and said, 'I want my damn house by Saturday . . .' "[216]

Choctaw County, Alabama, is using a free choice plan under a court order entered September 3, 1966.[217] According to the father of one girl who started to attend the white school in September, 1966, a customer of his wood-hauling business said that if he did not remove his daughter from the predominantly white school "maybe you won't do any more hauling." A week later he withdrew his daughter from the school although she had gotten along with her teachers and the white students, and had experienced no trouble. "I wanted to stay," she said.[218]

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[212] Staff interview, Dec. 7, 1966.

[213] Staff interview with Superintendent F. E. Dubose, Dec. 8, 1966.

[214] Staff interview, Dec. 8, 1966.

[215] Staff interview with Superintendent J. F. Lovell, Oct. 12, 1966.

[216] Staff interview, Oct. 13, 1966.

[217] *United States* v. *Choctaw County Board of Education*, C.A. No. 4246–66, S.D. Ala., Sept. 3, 1966.

[218] Staff interview, Jan. 30, 1967.

In McCormick County, South Carolina, five Negro children were attending previously all-white schools at the time of a staff visit on November 19, 1966.[219] A free choice plan first took effect during the second semester of the 1965–66 school year. Two Negro students elected to attend the previously all-white school starting January 16, 1966. The father of one of the students submitted a statement through a civil rights organization to the Department of Justice and the Commission two days later reporting events which he said took place on the Friday before the second semester began. Employed as a pipe fitter in the nearby town of Augusta, South Carolina, the father customarily had gone to work in the truck of a white fellow worker with another white employee. After questioning the father about his decision to send his child to a previously all-white school, one of the white workers said: "Colored ain't never went with whites here and it wasn't right. You're just fixing to have a bullet put in you." According to the father's statement:

> The other one said, "You don't get on my truck any more," and the other said, "You won't get on mine any more". Then one of the drivers said, "If I could have anything to do with it, you won't have any job here no more." But after work started my foreman [name omitted] told me that they had called him and told him they would let me work out the rest of the day, but to pick up my lay off slip at 5 o'clock because they didn't need me no more, and my job was played out.

The foreman denied that the layoff was connected with the statements of the other employees. The father, however, stated:

> I know my job isn't played out yet, and they will have to hire somebody to be down there on Monday to work at my job.[220]

Parents of two Negro children attending predominantly white schools in Dorchester County School District No. 1, South Carolina, told Commission staff that they both had lost their jobs in 1965 because of their involvement in school desegregation. The mother had worked for a dry cleaning establishment for 10 years and the father had held a job as a truck driver for a similar period. The family reported that during December, 1966, they received a Christmas card signed by one of the owners of the company which had employed the father. On the back, the sender had written: "I hope all of you and yours are well and fine for the holidays. I also hope some day you will forgive me for what the public forced me and my brothers to do. However, I think of you fondly and as a friend [signature]."[221]

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[219] Staff interviews, Nov. 19, 20, 1966.

[220] Staff interview, Nov. 21, 1966; letter from Richard Miles, Field Director, South Carolina Voter Education Project, to the Attorney General of the United States, Jan. 18, 1966.

The Southern Education Reporting Service reports the following instances of intimidation against Negro families in connection with the attendance of their children at formerly all-white schools:

—At a hearing to determine whether Federal funds to Dorchester School District 3 in South Carolina should be terminated, a Negro parent testified that her home was shot into and burned, and her children beaten, after they began attending predominantly white Harleyville-Ridgeville High School.[222]

—In September 1966, the home of a Negro family with children enrolled in a previously all-white school in Rowan County, North Carolina was hit by a shotgun blast at night, as was the home of a Negro teacher who was teaching in a previously all-white school and the home of a white principal of a junior high school which recently had increased its enrollment of Negro students.[223]

—Desegregation of school facilities in Morven, North Carolina and surrounding Anson County in the school year 1966–67 was accompanied by several bombings including the bombing of the home of a county school board member; threats to Negro parents and Ku Klux Klan activity.[224] Parents of 12 Negro children enrolled in a previously all-white school in Morven asked that their children be transferred back to a Negro school.[225] In February 1967, State Representative Fred Mills of Anson County urged the passage of State anti-terrorism bills, stating that such legislation was needed to end "a wave of terrorism" in his county.[226]

—At a HEW compliance hearing, a Negro from Mecklenburg County, Virginia testified that someone shot at his home after his two grandchildren had transferred to a white school.[227]

—On February 6, 1967, bullets damaged a service station owned by a Darlington, South Carolina civil rights leader who, on behalf of his children, had brought a school desegregation suit.[228]

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[221] Staff interview, Jan. 2, 1967. A facsimile of the Christmas card appears in Appendix IV.

[222] *School Desegregation in the Southern and Border States, March 1967*, compiled by The Southern Education Reporting Service.

[223] *Id.*, Sept. 1966.

[224] *Id.*, Oct. 1966.

[225] *Ibid.*

[226] *Id.*, Feb. 1967.

[227] *Ibid.*

[228] *Ibid.*

According to newspaper accounts, Negro parents whose children attend formerly all-white schools or attempted to enroll in such schools were subjected to economic reprisals, terrorist activity, and other forms of harassment in the following additional places: Columbia, Mississippi (Marion County);[229] Drew, Mississippi (Sunflower County);[230] Maben, Mississippi, (Oktibbeha County);[231] McConnells, South Carolina (York County);[232] Florence County, South Carolina;[233] Wilcox County, Alabama;[234] Sumter County, Georgia;[235] Bunn Level, North Carolina (Harnett County);[236] Wilson County, North Carolina;[237] Knightdale, North Carolina (Wake County);[238] and Mecklenburg County, Virginia.[239]

The possibility of retaliation is an important deterrent to the selection by Negro families of formerly all-white schools. Negro parents in the districts visited generally were aware of the occurrence of incidents of violent intimidation and economic reprisal through word of mouth, and had learned through news media of other well-publicized incidents. In the present study, parents of Negro children attending formerly all-white schools were asked why, in their opinion, more of their neighbors did not choose to send their children to the schools which were desegregating. Of the 237 parents interviewed, 142, or 59.9 percent, used the word "fear", or "afraid", or a similar expression in their response. Of persons using such expressions more than half indicated that fear of job loss, termination of credit, eviction or similar economic reprisal was deterring their neighbors; the remainder suggested that fear of violence was operating as a deterrent.[240]

Harassment by White Students

During the fall of 1966, episodes of violence by white adults and white students against Negro students attending previously all-white schools in Grenada, Mississippi and Bogalusa, Louisiana were widely reported.[241] The Commission sought to determine in its field study whether harassment of Negro students in the districts visited was widespread, and, generally, how well Negro children in these districts had been received in previously all-white schools.

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[229] Hattiesburg American, Mar. 1, 1967; Jackson Daily News, Mar. 2, 1967.

[230] Meridian Star, Mar. 3, 1967.

[231] Hattiesburg American, Mar. 23, 1967.

[232] The State (Columbia, S.C.), Sept. 17, 1966.

[233] *Id.*, Mar. 29, 1967.

[234] Washington Post, Dec. 20, 1966.

[235] Baltimore Afro-American, Sept. 17, 1966.

[236] Raleigh News & Observer, Oct. 20, 1966.

[237] Charlotte Observer, Jan. 17, 1967.

[238] *Id.*, Feb. 3, 1967; Raleigh News & Observer, Feb. 8, 1967.

[239] Norfolk Virginia-Pilot, Feb. 22, 1967.

[240] The Southern Education Reporting Service reports that at a HEW compliance hearing civil rights leaders in Mecklenburg County, Virginia stated that Negro parents had refused to send their children to white schools in the county because they were "fearful of repercussions"; that teams organized to call on Negro parents to persuade them to transfer their children to white schools "met with quite a bit of opposition", and that the children were willing to transfer but their parents resisted. *School Desegregation in the Southern and Border States, February 1967*, compiled by The Southern Education Reporting Service.

A small but significant number of Negro children reported that they were delighted with their new schools, had many friends, considered themselves popular, and were participating fully in extracurricular activities. This was especially true of the younger children.

In Albany, Georgia, previously a site of racial tension, an attorney representing Negro plaintiffs in a school desegregation case reported that a Negro boy starred on a high school football team and Negro students participated in a number of extra-curricular activities.[242] In Talladega, Alabama, a 12-year-old Negro girl attending ninth grade in a formerly all-white school in the city school district described what had happened when she had sat down at a lunchroom table at which a white boy was sitting. When the boy moved to another table, she moved to the same table. After the performance was repeated, the white boy was laughed at by other white students.[243]

In the Talledega County school system, Negro sisters in the 11th and 12th grades of a formerly all-white school enthusiastically reported that they attend school football games and play in athletic tournaments. One was nominated for a club office; the other attended the high school prom last year.[244]

At the opposite extreme, there were students in some districts who had been beaten repeatedly by white schoolmates. Negro students complained of multiple assaults with missiles ranging from spitballs and pecan hulls to rocks and paper gliders adorned with needles. Some of these students had left the white schools to return to Negro schools. Others—not permitted to return—were attending no school at all.

A 17-year-old girl, the only Negro student in her class in Ascension Parish, Louisiana, said that the white girls had done nothing to her but "turn up their noses", but that the boys threw rocks at her, walked on the back of her heels, spat upon her, and used obscene language. A 14-year-old Negro girl said she left school after five days because of this treatment.[245]

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[241] *E.g.*, Memphis (Tenn.) Commercial Appeal, Sept. 16, 1966; Jackson (Miss.) Daily News, Sept. 18, 1966; New Orleans Times-Picayune, Oct. 2, 1966.

[242] Staff interview, Oct. 14, 1966.

[243] Staff interview, Sept. 21, 1966.

[244] Staff interview, Sept. 21, 1966.

In Baker County, Georgia, the superintendent reported that all 18 of the Negro pupils who had attended the previously all-white school during the 1965–66 school year had chosen to return to the all-Negro schools during the 1966–67 school year.[246] In the fall of 1966 a new group of Negro students were attending the school. One, a 10-year-old boy, said that on October 10, 1966, three white boys "followed the bus home and beat me up after I got off. My mother called the sheriff but they said they could do nothing about it". On October 18 he was beaten again by two other white boys and hospitalized for two days;[247] his assailants were suspended from school for 10 days, but the superintendent reported that Negro parents kept their children out of school for two weeks because of fear of further violence to the children.[248]

Negro children attending the Choctaw County, Alabama, previously all-white schools, which were desegregating under a free-choice plan pursuant to court order, complained of abuse on school buses and outside the school building. They reported that white students had fastened pins to the front of paper gliders and sailed them at the heads of Negro students and had thrown rocks and spitballs at them, spat on their chairs, and shoved and elbowed them in the halls.[249] A Negro girl said she was expelled for pulling a knife after two white boys had kicked her and struck her with a stick. She stated that many white students have knives and that four or five of them had "showed me knives, said they'd go after me with them".[250] One Negro boy received a typewritten message on the bus which read:

> ". . . YOU AND YOURS SISTER ARE GOING TO GET THE HELL BEAT OUT OF YOU AND YOURS SISTER UNLESS YOU AND YOUR SISTER STOP COMMING TO SCHOOL. Go to your on negere schools. . . ."[251]

The school superintendent reported that he knew of only one incident—a fight which had resulted in two weeks suspension for a white student.[252]

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[245] Staff interview, Nov. 8, 1966.
[246] Staff interview with Superintendent H. F. Hall, Nov. 15, 1966.
[247] Staff interview, Nov. 14, 1966.
[248] Staff interview with Superintendent H. F. Hall, Nov. 15, 1966.
[249] Staff interviews, Jan. 30, 31, 1967.
[250] Staff interview, Jan. 30, 1967.
[251] A facsimile of this message appears in Appendix IV to this report.
[252] Staff interview with Superintendent William Wimberly, Jan. 31, 1967.

Negro children attending the Haywood County, Tennessee, school system complained of name-calling, shoving, and fighting. The house of one student attending the previously all-white school for the second year was bombed in May of 1966. He said: "After our house was bombed, some of the white students stated they would do it again".[253]

In McCormick County, South Carolina—desegregating under a 441–B free choice plan—24 Negro children chose to attend the formerly all-white schools during the April 1966 choice period, but only 13 actually attended such schools. Seven dropped out during the first three days, another after five weeks. By the time of the staff visit in mid-November 1966, the staff was informed that only five Negro children remained in these schools. Those who remained complained of being pushed, hit, and struck by objects thrown during class. The superintendent said he knew of no student conduct which he considered out of the ordinary other than an argument between a Negro student and a white classmate which had been settled without incident.[254] Similar complaints were made by students attending school in Dorchester County, South Carolina.[255]

The Southern Education Reporting Service reports that civil rights leaders from Mecklenburg County, Virginia testified at a HEW compliance hearing that Negro children who had transferred to white schools in the county were intimidated and harassed by their white classmates on county school buses. A Negro witness testified that his grandchildren had been "punctured in the head with pencils" by white children and that as a result of poor discipline on the bus he was driving his grandchildren 11 miles to school each day.[256]

According to newspaper accounts, intimidation and harrassment of Negro students attending formerly all-white schools also were reported in at least the following places: Canton, Mississippi (Madison County);[257] Chalmette, Louisiana (St. Bernard Parish);[258] Baton Rouge, Louisiana (Livingston Parish),[259] and Camden, Alabama (Wilcox County).[260]

Misconduct of white students involving assaults or resulting in physical injury was not widespread in most of the school systems visited. More restrained forms of misconduct, however, were common. Of the 365 Negro children who were attending previously all-white schools and who were interviewed by Commission staff, 61.6 percent complained that white classmates had abused them with racial epithets, especially during the early weeks of the Fall term. Minor incidents of discourtesy or harassment were recounted by many of these children: thumbtacks placed on their chairs, the heels of their shoes stepped on, or books knocked from their hands. Many stated that white students would move to another seat when Negro students sat near them in class. Some 17.5 percent, attending school in 27 different counties, complained that if a Negro student sat down at a lunchroom table at which white students were seated, the white students would change tables.

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[253] Staff interview, Dec. 2, 1967.

[254] Staff interview with Superintendent John H. Cely, Jr., Nov. 21, 1966.

[255] Staff interviews, Jan. 1, 2, 1967.

[256] *School Desegregation in the Southern and Border States, Feb. 1967,* compiled by The Southern Education Reporting Service.

[257] Christian Science Monitor, Jan. 26, 1967.

[258] Shreveport Times, Sept. 4, 1966.

[259] *Id.*, Oct. 20, 1966.

[260] Washington Post, Dec. 20, 1966.

Conduct of School and Other Public Officials

School authorities in most 441–B districts visited conformed closely to the technical requirements of the guidelines governing notices, forms, publication procedures, and choice periods.

Nearly all the 441–B districts visited used the notices and forms prescribed by HEW verbatim and complied with the requirements that detailed notice and explanation of the choice period be printed prominently in a local newspaper. Typically, a 30-day choice period took place in April. The parents of each child in the grades covered by the plan received printed or mimeographed copies of the district's desegregation plan, a notice of the commencement, duration, and purpose of the choice period, and a choice form showing the names and addresses of all schools in the district which were of the appropriate grade level for the child. The parent, or the child if he were 15-years or older, needed only to check the school selected and to sign and return the form.

While the guidelines required that the forms be sent out by first class mail, most districts found that a very large proportion of their mailings was returned for want of adequate mailing addresses. Most supplemented the mailing by furnishing additional forms to the children through classroom teachers. It was customary to request completed forms repeatedly until they were received. In most of the 441–B districts visited, the school authorities obtained forms from all, or virtually all, children, Negro and white, and accepted late forms without penalty. In most cases, choices once exercised were final and very few Negro children were permitted to reverse their decision to attend a formerly all-white school once the choice had been made.

Many school superintendents made one or more public appearances before PTAs or civic clubs to explain the requirements of the free choice plan and to request support. And in some districts the 1966–67 plans covered all 12 grades even though this was not required until the 1967–68 school year.

A large majority of the Negro students in the districts visited said that they considered both their principals and their teachers fair. In some cases these students reported receiving not only fair treatment but affirmative encouragement from teachers.

In one Mississippi city with a history of extreme violence, the superintendent visited Negro schools and met with individual Negro families seeking to reassure Negro children that they would not be harassed at previously all-white schools.[261]

In an Alabama district, a Negro mother reported that her son, one of three Negro students in a previously all-white school, had been elected secretary-treasurer of his class. He also qualified for the junior football team. When a white student used a racial epithet in cheering for the Negro student at a football game, the white student was admonished by the school principal.[262]

In one Georgia county, where 19 of 2,100 Negroes were attending previously all-white schools, a Negro mother reported to Commission attorneys that her son had been attacked repeatedly by white classmates but that he believed his high school principal to be fair. During a Commission staff interview with the principal the same day, a fight between the son and two white students was stopped by a teacher and the students were brought to the principal's office. The white students were punished. Subsequently, the Negro student said he believed the punishment the white students received would have been equally severe had the Commission staff not been present.[263]

In one Alabama school district, the school board had refused to sign a 441–B form; Federal funds had been deferred and the district noticed for hearing. Nevertheless, the district was operating a free choice plan with greater success than some neighboring districts.

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[261] Staff interview, Dec. 12, 1966.
[262] Staff interview, Nov. 7, 1966.
[263] Staff interview, Oct. 12, 1966.

The superintendent was seeking to persuade his board to sign the form. He also was taking steps to insure that Negro students in the previously all-white schools were properly treated. His instructions to the white teachers reflected both intent to achieve successful desegregation and persistence of traditional racial attitudes. "When a [Negro] child comes in the front door, he's just as white as anybody in there." [264]

In some districts, on the other hand, students complained that their teachers used, or permitted the use of, racial epithets in the classroom, refused to call on Negro pupils to recite and subsequently gave them lower grades than white students because of poor recital. Commission attorneys found the following additional indications of official misconduct designed to influence Negroes not to choose formerly all-white schools or to penalize Negroes for electing such schools:

In an Alabama county the school board refused to sign a Form 441–B and for the 1966–67 school year was desegregating under a voluntary 8-grade freedom of choice plan.[265] Parents of 15 Negro students chose previously all-white schools for their children, but all parents withdrew their choices. The superintendent stated that he had contacted every parent and had told each that his child had a right to attend such a school.[266] Commission attorneys talked to the parents of all children who withdrew. Their version of their encounters with the superintendent differed from his. Every couple except one stated that they would have left their children in the previously all-white school but for the superintendent's assertion that he would be the only Negro child in the school or that he could not guarantee the child's safety. The remaining couple asserted that their application had been a mistake.[267]

In the independent school system of the town of Linden in Marengo County, Alabama, the mother of a Negro child who entered the previously all-white high school made her decision in May at the close of a 30-day choice period.[268] According to the mother, shortly thereafter a Linden newspaper carried the names of the Negro children entering the formerly all-white elementary and high schools. She reported that in July, she was stopped, searched, and arrested for possession of a can of beer, which is illegal in Marengo County. She posted $5 bond and was released.

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[264] Staff interview, Nov. 8, 1966.

[265] Notwithstanding its failure to file a 441-B, the school district received $327,000 in Federal funds to supplement State and county funds of $1,098,000.

[266] Staff interview, Nov. 11, 1966.

[267] Staff interviews, Nov. 8 and 9, 1966.

[268] Staff interview, Nov. 7, 1966.

Later that week, she said, she was arrested for reckless driving and required to pay $42 in damages and costs. On the following day the manager of the public housing project in which she was a tenant told her he had been informed that she had been convicted of the possession of whiskey—a more serious charge than the possession of beer—and that she must leave the housing project. She was evicted in September. When she went to pick up her child at school during the first week, her car was followed and stopped by the police. Purporting to test her brakes by stepping on them, the police officer informed her they were defective and said she would be jailed if they were not repaired. The garage mechanic to whom she took the car informed her that the brakes were in proper working order.[269]

A Negro parent in a Mississippi county who drove a school bus to the Negro schools, but had enrolled his child in a formerly all-white school, received a letter asking him to come to the superintendent's office. According to the driver, the superintendent said that "it's not me, but I don't think the Board is going to like this, your driving a bus and their taking another bus." [270]

In a Texas county, a Negro family which had chosen the white school for the 1965–66 school year reported that the Negro principal of the all-Negro school tried, at first unsucessfully, to induce the family to return its children to the Negro school. According to the mother, the principal then "went to my husband's employer at the feed store. After [my husband's] . . . boss told him he better sign if he wants to keep his job, we signed the form, choosing the Negro school. This year we just went on and signed to go to the Negro school because we knew that the school officials were going to do what they wanted to do anyway." [271] The superintendent told the Commission staff: "My nigger principal has been here 39 years and he tells his people what is best for them." [272]

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[269] After a summer layoff, she returned to her autumn job of weighing samples of cotton at a local cotton gin. Three weeks later she requested a day off to attend a Public Housing Authority hearing on her pending eviction in Selma. She said:

> Usually we work until March, nine hours a day, six days a week. Saturday I went to Selma, on the following Monday I went back to work. They told me I didn't have a job. So I lost the job.

[270] Staff interview, Dec. 6, 1966.

[271] Staff interview, Dec. 7, 1966.

[272] Staff interview, Dec. 7, 1966.

In this school system there are two 12-grade schools, one all-Negro and one all-white. Five Negro children chose to attend the previously all-white school during the April 1965 choice period, but all five later changed their minds or moved out of the district. The mother of one stated that in late summer the superintendent had called her and asked why she wanted to send her children to a white school. A few days later the constable had come to see her and asked the same question. "He suggested that I change my mind if I wanted to get along in this town . . . When it got time for school to start I sent the kids to the Negro school and they had me to fill out a new choice form and write a letter to the superintendent telling him why I changed my mind." She was apprehensive about speaking with a Commission representative: "I hope they don't find out about this meeting with you, because this cafe is all I got and I don't want to lose it. If you can, write this up without using my name." [273]

In a Florida county operating a free choice system for the second year, 20 Negro students chose to attend the previously all-white school during the 1965 spring choice period, but no Negro children attended the school during either the 1965–66 or 1966–67 school year. According to the superintendent, the parents of all 20 children came into his office during the late spring and summer of 1965 and stated either that they had made a mistake or that they did not know how their children had been assigned to the white school. The superintendent permitted them to fill out new choice forms by which each selected the Negro school for his children. No Negroes chose to attend the previously all-white schools during the 1966 choice period.[274]

In a Florida county a Negro woman who was employed as a cook at the county jail in 1965 had chosen the white school for her niece. She reported that about a week after she had handed in the choice form her employer, the sheriff, "asked me if I had filled out the form to select the white school for my niece. I replied, 'yes,' and he said that the white people had asked him to fire me. He was nice but told me of Negroes on the farms who had already been fired for selecting the white school or who had been forced to change their choice back to the Negro school. He then asked me to change my choice back to the Negro school for my niece. While he actually didn't tell me that I'd lose my job, I am certain that is what he meant. Therefore, in order to keep my job I asked him to get the form back, which he did".[275] The niece was still in the all-Negro school in 1966 although her aunt told Commission staff that she thought the white school provided a better education and "I would like to send her there if I knew nothing would happen to me or her." [276]

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[273] Staff interview, Dec. 6, 1966.
[274] Staff interview, Oct. 21, 1966.

In Baker County, Georgia, Negro students reported that teachers and administrators had made no effort to stop misconduct by white students.[277] One Negro girl stated: "I tried to stop a white boy from hitting Eddie [another Negro student], and he hit me. I started crying and went to the principal's office. [A teacher] told me that they didn't ask the Negroes to attend school there and that they were not welcome." A Negro boy reported: "On September 14, a white boy [name deleted] deliberately pushed me and knocked me down. [A school administrator] did nothing about this, although he saw me lying on the floor." [278]

A limited number of school officials were reported to have denied Negro students participation in the social and extracurricular activities which were a normal part of school life for white students.

The annual prom for one high school in Ascension Parish, Louisiana, was held as a private social event in the local Elks' hall instead of in a school building during the 1965–66 school year. Admission was by invitation only. The dance was listed as a school function on the school calendar and students who attended were given time off from school on the following school day.[279] A 17-year-old Negro girl attending another high school said she was told that she would be permitted to attend her school's prom but that it would not be "wise". She could bring an escort but neither she nor the escort would be permitted to dance with anyone else. She did not go because "they didn't want me".[280]

In Baker County, Georgia, a Negro student complained that all extra-curricular activities had been abolished except for basketball and that no Negro girls were allowed to join the girl's basketball team.[281]

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[275] Staff interview, Oct. 20, 1966.
[276] *Ibid.*
[277] Staff interviews, Nov. 14, 1966.
[278] *Ibid.*
[279] Staff interview with Superintendent Gordon Webb, Oct. 26, 1966.
[280] Staff interview, Oct. 24, 1966.
[281] Staff interview, Nov. 14, 1966.

A Negro student in Beauregard Parish, Louisiana, said she had been told by a teacher that "I don't believe you can go to our parties, but I'll check." The student said she had heard nothing further.[282]

In 1954, the Butler County, Alabama, Parent-Teachers Association was disbanded and replaced by the Butler County Parent-Teachers Organization, which purports to be a private membership organization but holds its meetings on school property. During the 1965–66 school year, before desegregation began, the organization promulgated a rule requiring that new applicants for membership be sponsored by two current members. On October 11, 1966, Negro parents whose children were enrolled in a previously all-white school sought to attend a P.T.O. meeting in the school but were asked to leave.[283]

The Effects of Poverty

In some Georgia and Alabama counties, Negro parents noted that charges are assessed against school children taking courses requiring special equipment, such as laboratory sciences and typing, and that fees are exacted for use of lockers and libraries. In several districts these charges are greater in the white school system because the Negro schools do not offer the courses and do not have the facilities which require the fees.

The deterrent effect of poverty itself upon the choice by poor Negro families of formerly all-white schools is not necessarily erased where the fees charged by the white and Negro schools are equal. In Butler County, Alabama; Bertie and Edgecombe Counties, North Carolina; Richland, South Carolina; and Eudora, Arkansas, Negro parents volunteered the suggestion that they and their neighbors were embarrassed to permit their children to attend predominantly white schools without suitable clothes. One family enrolled four older children in formerly all-white schools but kept three younger ones in Negro schools solely because it could not afford decent clothing for the younger children.[284]

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[282] Staff interview, Oct. 11, 1966.

[283] Staff interviews, Dec. 7, 8, 1966.

[284] In a study of South Carolina school desegregation conducted by the School Desegregation Task Force of the American Friends Service Committee and the NAACP Legal Defense and Educational Fund, another kind of fear—fear of academic failure—was found to be a factor in the reluctance of Negro parents to send their children to desegregated schools. Mizell, *School Desegregation in South Carolina, 1966: A Critique,* 12–13, Dec. 1966. In many areas of the South Negro school facilities, programs, and

The problem is aggravated in some districts—such as North and South Panola, Mississippi—where funds provided under Title I of the Elementary and Secondary Education Act of 1965 are used to provide free lunches for Negro children in the all-Negro schools but not for children attending the previously all-white schools.[285]

Inadequate Court Orders

Of the several districts desegregating under court order that were visited by Commission staff, most, although not all, were governed by school boards which had taken intransigent positions in the past. For the most part the requirements to which they were subjected by judicial decree were less stringent than the 1966 guidelines. Most of these districts were allowed to fulfill public notification requirements through the publication of an inconspicuous notice; to require Negro parents wishing to place their children in white schools to make their request in person at the school board's offices; to use extremely brief choice periods; and to refuse to accept substantial numbers of choices for reasons of questionable validity.

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academic standards have been inferior to facilities, programs, and standards in white schools. The decree in *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966) *aff'd on rehearing en banc.* C.A. No. 23345, 5th Cir., Mar. 29, 1967, contained a School Equalization section which ordered the defendants to take prompt steps necessary to provide in the formerly all-Negro schools "physical facilities, equipment, courses of instruction, and instructional materials of quality equal to that provided in schools previously maintained for white students", and provided that if the improvements neceessary to equalize a school were "not feasible", the "school shall be closed as soon as possible, and students enrolled in the school shall be reassigned on the basis of freedom of choice." The defendants also were ordered to provide remedial education programs for students who had attended segregated schools or who were presently attending such schools to overcome past inadequacies in their education. Slip opinion, pp. 17–18. In *United States* v. *Lowndes County Board of Education*, 11 Race Rel. L. Rep. 692 (M.D. Ala. 1966), one of the stipulations of the parties was that the educational opportunities which had been afforded to some Negro students were inferior to those offered to white students. The defendants were ordered to design and provide remedial educational programs to eliminate the effects of this past discrimination. See also *Lee* v. *Macon County Board of Education*, 267 F. Supp. 459 (M.D. Ala. 1967). The guidelines treat inferior facilities, teaching materials, and educational programs as forms of discrimination which a school system is required to correct. 1966 guidelines, 181.15. This difference in academic standards presents an additional obstacle which many Negro students attending formerly all-white schools must overcome. Because of the deficient education he received in earlier grades, the Negro student may be ill-prepared to handle the more exacting assignments in the white school.

[285] For fiscal 1966, $20.9 million in Title I funds were budgeted for food services. Approximately $21.9 million was budgeted for fiscal 1967. Staff interview with John F. Staehle, Assistant Director for Policy and Procedures, Division of Compensatory Education, Office of Education, May 15, 1967. This program is not to be confused with that administered by the Department of Agriculture under the National School Lunch Act, 60 Stat. 231 (1946). Though there are substantial Federal and State contributions to the cost of lunches made available to students under the National School Lunch program, the requirement that the lunch program of each participating school be financially self-sustaining means that only about 10 percent of these lunches are distributed to students free or at a price reduced below the prevailing cost of 25¢ to 35¢. See *Hearings on H. R. 14596, Senate Subcommittee on Appropriations*, 89th Cong. 2d Sess. (1966).

St. James Parish, Louisiana, began desegregating its schools on January 18, 1966, when U.S. District Judge E. Gordon West ordered only one grade of the parish schools to be desegregated under a free choice plan.[286] In September 1966, seven more grades were brought under the plan. The "choice" which was granted to Negro children, however, was merely the option to transfer to previously all-white schools from the all-Negro schools to which they initially were assigned because of their race. During the 1966–67 school year there was no requirement that each student choose the school he wished to attend. Forms were not mailed out but were available only in the office of the principal of each Negro school. The choice period lasted only from May 17 to May 26. Apart from two newspaper publications there was no notice to Negro parents of how the choice system would operate.[287] Although the superintendent stated that principals had been instructed to make announcements in their schools concerning the operation of the plan, according to the students some principals failed to make such announcements. Fifty-three Negro children out of 3,098 were attending the previously all-white schools at the time of the staff visit.

Caddo Parish, Louisiana, which includes the city of Shreveport, is desegregating under a court order. There are more than 24,000 Negro students in the Caddo Parish school system,[288] but only seven attended formerly all-white schools during the 1966–67 school year.[289] Although the court order purported to establish a free choice system covering eight grades for the 1966–67 school year, the only notice to parents concerning the free choice procedures appeared in scattered newspaper advertisements. Parents wishing to place their children in schools other than those to which they had been assigned by race were required to come to the office of the school superintendent with their children to complete the necessary blanks between May 2 and May 6, 1966. The parents in one family reported that they were required to return home, get their children, and take them to the school superintendent's office before the superintendent would approve the transfer of the children to a "white" school.[290]

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[286] *Banks* v. *St. James Parish School Board,* C.A. 16173, E.D. La., Jan. 18, 1966.

[287] Staff interview with Superintendent E. L. Rousel, Nov. 8, 1966.

[288] Figure supplied by Department of Justice.

[289] Staff interview with Superintendent C. L. Perry, Nov. 17, 1966.

[290] Staff interview, Nov. 14, 1966.

The city of Birmingham, Alabama, is desegregating its schools pursuant to a court order entered July 28, 1964.[291] Slightly less than one-half of the Birmingham school enrollment of 68,765 students is Negro. Yet in November 1966, only 360 Negro children attended previously all-white schools.[292] A notice that applications for transfer filed at the office of the superintendent of education on or before August 10, 1966, would be processed and determined by the board was published on June 24, July 8 and July 22, 1966. No notices were mailed to parents generally. No choice forms were mailed out and forms were distributed in school only to 8th graders transferring to high schools and 1st graders entering school for the first time.

During the spring of 1966, Hale County, Alabama, was operating under a voluntary free choice plan. As a result of extensive efforts by civil rights organizations, choice forms were filed during the spring choice period on behalf of approximately 205 Negro children selecting previously all-white schools.[293] Most of these were rejected; only 20 Negro children attended the previously all-white schools at the beginning of September. Justice Department litigation, commenced during the summer, resulted in a court decree granting a second opportunity for children whose choices had been refused to reapply. Under the terms of the order, however, the board was to mail out notices to reapply by Friday, September 16, 1966. These notices were not received by many students until the following Monday. Applicants wishing to take advantage of their opportunity were required by 5:00 p.m. Tuesday, the following day, to prepare signed statements and place them in the hands of the board. Fifty-five students requested reconsideration. Of these, 35 were accepted and 20 were refused.[294] Among the reasons accepted by the court for the refusals were:

> "overaged for the grade level in which they are to be placed" (3 children)
> "original application was not filed in this name" (2 children)
> "lives beyond the limits of the established bus route serving the school" (3 children)[295]

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[291] *Armstrong, et al.* v. *Board of Education of City of Birmingham,* C.A. No. 9678, N.D. Ala., June 29, 1964.

[292] Staff interview with Superintendent Raymond Christian, Sept. 21, 1966.

[293] Staff interview, Nov. 8, 1966.

[294] Staff interview with Maury Smith, Esq., attorney representing Hale County School Board, Nov. 11, 1966.

[295] The attorney for the school board indicated that in some cases bus routes had been altered to accommodate some Negro children.

> "lives beyond the limits of the established bus route serving the school and also no record of previous school attendance"
> "conduct and character undesirable as reported by Negro citizens of her school community"
> "request for reconsideration signed 'Peace and Black Power' indicates a belligerent attitude"
> "request for reconsideration not signed by parent or guardian whose signature appeared on original application."

On June 23, 1966, all Federal financial assistance to the Indianola Municipal Separate School District in Mississippi was terminated for failure of the district to submit an acceptable voluntary desegregation plan. Two months later the district was placed under a court order[296] and thus became eligible to receive Federal financial aid. For children living outside the city limits but still in the district, the court decreed initial desegregation of six grades based upon free choice with no provision for faculty desegregation.

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[296] *United States* v. *Indianola Municipal Separate School District,* C.A. No. GC-6637, N.D. Miss., Aug. 26, 1966.

9. PRIVATE SCHOOLS

A. The Formation of Segregated Private Schools

In a recent opinion, Judge John Minor Wisdom of the U.S. Court of Appeals for the Fifth Circuit, describing problems faced by Southern educators and school administrators, mentioned the development of segregated private schools:

> Private schools, aided by state grants, have mushroomed in some states in this circuit. The flight of white children to these new schools and to establish private and parochial schools promotes resegregation.[297]

A month earlier it had been reported that

> Only Florida and Texas report no obvious cases of private schools formed to avoid desegregation in public schools.[298]

According to information agreed upon in a lawsuit between the Department of Justice and other parties, during the 1966–67 school year at least 13 segregated private schools exclusively for whites were in operation in Alabama.[299] There were 67 such schools in Louisiana,[300] 35 in Mississippi,[301] and 44 in South Carolina.[302] EEOP reports that as of July 18, 1966, there were nine such schools in North Carolina and 29 in Virginia.[303] The Department of Justice figures do not include parochial schools and the EEOP figures do not include parochial schools or military academies.

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[297] *United States* v. *Jefferson County Board of Education, supra* note 284, at 848-49 (dictum).

[298] Leeson, *Private Schools Continue to Increase in the South,* Southern Education Report, Nov. 1966, p. 22.

[299] Stipulation of Facts, *Lee* v. *Macon County Board of Education,* 267 F. Supp. 458 (M.D. Ala. 1967), *stipulation filed* Sept. 30, 1966, hereafter referred to as the "*Lee* Stipulation."

[300] Department of Justice, Memorandum in Support of Plaintiff-Intervenor's Findings of Fact, Conclusions of Law and Decree, *Poindexter* v. *Louisiana Financial Assistance Commission,* C.A. No. 14683, E.D. La., *memorandum filed* May 1, 1967, p. 19, hereafter referred to as the "*Poindexter* Brief."

[301] Department of Justice, Brief in Support of Plaintiff-Intervenor's Proposed Findings of Fact, Conclusions of Law and Decree, *Coffey* v. *State Educational Finance Commission,* C.A. No. 3906, S.D. Miss., *action filed* Feb. 21, 1966, p. 39, hereafter referred to as the "*Coffey* Brief."

[302] Information provided by the Department of Justice relating to proceedings in *Brown* v. *State Board of Education,* C.A. No. AC 1655, D.S.C., March 12, 1965.

[303] Information supplied by EEOP, dated July 18, 1966.

The number of students attending segregated private schools is significant. According to information gathered by the Department of Justice, segregated private schools are attended by about 2,800 students in Mississippi,[304] and by approximately 16,500 students in Louisiana.[305] In Alabama, in September 1966, 13 schools in nine counties contained more than 2,000 white students.[306] Segregated private schools in South Carolina were reported in November 1966, to have enrolled approximately 4,500 pupils.[307] While the number of students attending these schools makes up only a small percentage of the statewide elementary and secondary school population of these States, it often comprises a substantial proportion of the number of students normally attending public schools in the counties in which the schools are located.

The organization of the vast majority of the private non-sectarian schools for white students in Southern States undoubtedly was influenced by the desegregation of public school systems under the terms of court orders implementing the decision of the Supreme Court in *Brown* v. *Board of Education* or under desegregation plans submitted to retain Federal funds under Title VI of the Civil Rights Act of 1964.

During the school year 1964–65, only five regular non-sectarian private schools for white students were operating in Mississippi.[308] By the next school year, however, after the Department of Health, Education, and Welfare had adopted its first set of school desegregation guidelines and after 13 additional law suits had been filed in Mississippi to abolish dual school systems, a total of 20 new segregated private schools commenced operations. In each case the new private school opened up in a public school district which either was under court order to desegregate or had submitted a voluntary desegregation plan to the Department of Health, Education, and Welfare.

In Louisiana the desegregation of public schools similarly was responsible for the formation of private non-sectarian schools for white children. Prior to the *Brown* decision in 1954, there were only 16 white private schools in the State.[309] From 1954 to the present, 53 additional private schools for white students have been established. All of the non-sectarian segregated private schools which maintained classes during the 1966–67 school year were located in nine school districts in which the public schools had been ordered to desegregate by Federal courts. Of the nine counties in Alabama in which the 13 known exclusively white schools are located, eight contain private schools for whites established subsequent to court-ordered desegregation or the adoption by the respective public school systems of Title VI desegregation plans.[310]

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[304] *Coffey* Brief 39.

[305] *Poindexter* Brief, Appendix B. There are also in Louisiana 12 segregated private schools for Negro students attended by approximately 950 students.

[306] *Lee* Stipulation.

[307] Leeson, *supra* note 298, at 22.

[308] Information on Mississippi from *Coffey* Brief, 22–24.

Private schools for white students in South Carolina were not established until after September 1963, when the first school district in that State desegregated.[311] Between the fall of 1963 and the fall of 1966, with the entry of additional court orders and the submission of Title VI desegregation plans, at least 44 new segregated private schools were planned or formed in the State.[312] One of the major promoters of South Carolina's private school system is reported to have remarked: "The heavier the hand of Washington on the public schools, the more rapid the growth of private schools will be." [313]

The formation of private schools for white pupils has been encouraged and facilitated by the availability from Southern State governments of tuition grants which were instituted to resist and frustrate the implementation of the 1954 *Brown* decision. Subsequent to that decision, as public school desegregation became imminent, eight Southern States authorized grants of State or local funds either to parents of students choosing to attend private schools or to the schools themselves.[314] In some instances, public school desegregation was made a criterion of eligibility. For example, the North Carolina statute made funds available to every child who was "assigned to a public school attended by a child of another race against the wishes of his parent or guardian." [315] Tuition grant legislation also was passed in connection with school closing laws permitting the elimination of public school systems or together with the repeal of compulsory school attendance, both measures designed to avoid public school desegregation.[316] Other tuition grant statutes, such as the 1960 Virginia enactment, allowed tuition grants for attendance at all "non-sectarian private schools," and thus were not so obviously related to public school desegregation.[317]

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[309] Information on Louisiana from *Poindexter* Brief, 17–20.

[310] *Lee* Stipulation.

[311] For a description of the initial school desegregation in South Carolina, see U.S. Commission on Civil Rights, 1964 Staff Report, *Public Education*, 182–97.

[312] Information obtained from the Department of Justice.

[313] Leeson, *supra* note 298, at 22.

[314] State grants were authorized by the following States:
Alabama: Ala. Acts 1957, No. 528, p. 723; Ala. Acts 1965, No. 687, p. 1281, as amended by Ala. Acts 1966, Sp. Sess., Act No. 170.
Arkansas: Ark. Acts 1959, 2d Ex. Sess., No. 5, p. 2004, as amended by No. 151, p. 936.
Georgia: Ga. Acts 1956, No. 11, p. 6; Ga. Acts 1961, No. 14, p. 35.
Louisiana: La. Acts 1958, No. 258, p. 850; La. Acts 1960, 2d Ex. Sess., No. 3, p. 61 (West ed.); La. Acts 1962, No. 147, p. 337.
Mississippi: Miss. Laws 1964, 1st Ex. Sess., ch. 27, p. 56.
North Carolina: N.C. Laws 1956, Ex. Sess., ch. 1, p. 1; ch. 3, p. 4.
South Carolina: S.C. Acts 1963, No. 297, p. 498.
Virginia: Va. Acts 1956, Ex. Sess., ch. 70, p. 74, as amended by Va. Acts 1958, ch. 500, p. 638, as amended by Va. Acts Ex. Sess. 1959, ch. 71, p. 165; Va. Acts 1960, ch. 448, p. 703.

The theory behind this legislation was that since the 14th amendment prohibits racial segregation only by States and their instrumentalities, the duty to desegregate may be avoided by the substitution for the public schools of a system of ostensibly private schools indirectly financed and maintained by the State. The courts, however, have refused to accept this attempt by States to evade public school desegregation. Whether obviously designed to avoid the *Brown* decision or not on their face related to public school desegregation, statutes authorizing tuition grants for attendance at private schools in Alabama,[318] Arkansas,[319] North Carolina,[320] South Carolina,[321] and Virginia [322] have been voided by Federal courts as unconstitutional State support and encouragement of racial segregation.[323] A statute in Louisiana, though not specifically voided by the Federal district court, was similarly condemned.[324] Suits to enjoin the operation of tuition grant laws in Louisiana[325] and Mississippi[326] on the same grounds are pending.

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[315] N.C. Laws, 1956, Ex. Sess. ch. 3, p. 4.

[316] *E.g.*, Ga. Acts 1956, No. 11, p. 6: Ala. Acts 1956, 1st Ex. Sess., No. 82, p. 119 (approved in referendum in Aug. 1956). See generally, U.S. Commission on Civil Rights, 1961 Report, Vol. 2, *Education*, 79–98.

[317] Va. Acts 1960, ch. 448, p. 703.

[318] *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala. 1964); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (M.D. Ala. 1967).

[319] *Aaron* v. *McKinley*, 173 F.Supp. 944 (E.D. Ark. 1959), *aff'd per curiam sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959).

[320] *Hawkins* v. *North Carolina State Board of Education*, 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966).

[321] A temporary injunction was granted in *Brown* v. *State Board of Education, supra* note 302.

[322] *Pettaway* v. *County School Board of Surry County, Virginia*, 230 F.Supp. 480 (E.D. Va. 1964), *aff'd and remanded*, 339 F. 2d 486 (4th Cir. 1964); *Griffiin* v. *State Board of Education*, 239 F. Supp. 560 (E.D. Va. 1965).

[323] In the Virginia case the court determined that payment of tuition grants under a statute not unconstitutional on its face violates the Fourteenth Amendment "if the private school is the creature of, or is preponderantly maintained by, the grants . . ." 239 F. Supp. at 565. Other courts have held, however, that state financial support need not be preponderant to be unconstitutional. See discussion in *Poindexter* v. *Louisiana Financial Assistance Commission, infra* note 325, at 164–65, and Note, 79 Harv. L. Rev. 841 (1966). In the second Alabama tuition grant case the court laid down the broad rule that: "It is axiomatic that a State may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Lee* v. *Macon County Board of Education, supra* note 318 (slip opinion at 23–24).

Information obtained by the Department of Justice in connection with tuition grant litigation demonstrates that private schools in the South are very much an outgrowth of this unconstitutional State legislation. In Alabama, an analysis—agreed upon by all parties—of the establishment of private schools in nine Alabama counties shows that private schools in three counties were begun after the passage of the 1957 tuition grant statute and in the other six counties were created shortly after the passage of the 1965 tuition grant law.[327]

Prior to the enactment of a Louisiana tuition grant statute in 1960, there were 25 private schools for white students in the State.[328] After the 1960 act was passed, eight additional private schools began operations. After a new tuition grant statute was passed in 1962, some 36 of the present 64 schools attended by white students receiving tuition grants were formed.

Mississippi had only three segregated regular private schools *i.e.*, schools for normal children, whose students subsequently received State grants before the enactment of tuition grant legislation in 1964.[329] For the first two years in which the tuition grant statute was in effect, 22 new private schools whose students received grants were formed. Some schools which operated in the 1965–66 school year failed to reopen for the 1966–67 school year, but in their place 13 new private schools whose students receive State grants were opened. During the 1966–67 school year in Mississippi there were 35 private schools for white students only whose students received State aid to finance their education. A similar relationship in the other Southern States between State legislation designed to finance or having the effect of financing racial segregation in education and the establishment of private schools has been noted.[330]

While many of these segregated private schools would not have been established but for the aid received from State governments in the form of tuition grants, tax deductible contributions from private citizens also constitute an important source of financing. As part of its presentation in the *Coffey* case, the Department of Justice made an extensive analysis of the finances of 24 Mississippi private schools attended only by white students.[331] The analysis was based upon depositions and records received from officials of these schools. From a review of this material the Department of Justice concluded:

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[324] *Bush* v. *Orleans Parish School Board*, 188 F. Supp. 916, 927–8 (E.D. La. 1960).

[325] *Poindexter* v. *Louisiana Financial Assistance Commission*, C.A. No. 14683, E.D. La., filed June 29, 1964. A motion to dismiss the action was denied, 258 F. Supp. 158 (E.D. La. 1966).

[326] *Coffey* v. *State Educational Finance Commission*, *supra* note 301.

[327] *Lee* Stipulation.

[328] Information on Louisiana from *Poindexter* Brief 17–19.

[329] Information on Mississippi from *Coffey* Brief 22–24, 39.

[330] See *Leeson*, *supra* note 298.

> In each instance the formation and operation of the school has been on the thinnest financial basis. With most of the schools, their lack of financing has necessitated considerable contributions of time, labor, money and property by those involved. Clearly, the schools could not have survived as even semblances of educational institutions without these contributions. . .[332]

Of the 13 known private schools for whites only in Alabama, only four received State tuition grant payments in the 1965–66 school year and only three received State money in the 1966–67 school year.[333] Further, the tuition charged for pupils attending these schools, taken with attendance figures, does not appear to cover construction costs and costs of operation. Thus private contributions seem to be an important source of revenue for private schools in Alabama.[334] In other States as well, private contributions appear to be a significant factor in enabling segregated private schools to start and continue operations,[335] with the possible exception of Louisiana, where State tuition grants of $2,095,028 went to 15,177 recipients.[336]

Under the Internal Revenue Code of 1954, privately owned and operated educational institutions are granted considerable encouragement and financial benefits.[337] Among other benefits, their income is exempt from taxation and both corporate and private contributions to their operations are, within limits, deductible from the contributor's "adjusted gross income".[338] Although no deduction is allowable for contributions of services, unreimbursed expenditures made in connection with rendering services may be deductible.[339]

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[331] *Coffey* Brief, Appendix F.

[332] *Coffey* Brief 56.

[333] *Lee* Stipulation.

[334] The Governor of Alabama made an official appeal for contributions to support these schools. See *Lee* v. *Macon County Board of Education, supra* note 318 at 477 n. 5.

[335] See Washington Evening Star, January 20, 1967.

[336] *Poindexter* Brief 18.

[337] See Appendix VIII, p. 145 Note 3.

[338] Treas. Reg. § 1.170–1.

[339] Treas. Reg. § 1.170–2(a)(2).

Approximately 17 segregated private schools (schools which exclude Negroes) have been approved by the Internal Revenue Service for the receipt of these tax benefits. As of March 1967, approximately 40 new segregated private schools had applications pending with IRS for grants of tax exemption and tax deductibility.[340] The Internal Revenue Service has indicated that it is concerned with the statutory and constitutional problems raised by these applications and that it is weighing these in disposing of the applications.

B. Commission Investigations

During the Commission's field work, staff members visited three counties in which private schools recently had opened with marked effect on desegregation of the public schools.

Holmes County, Mississippi

A law suit asking an end to racial segregation in the public schools of Holmes County, Mississippi, was begun in July of 1965. On August 16, 1965, the district court ordered desegregation of the system under a four-grades-a-year free choice plan.[341] The following month three segregated private schools began to operate in the county, and there was an almost total white boycott of the desegregated grades of the public school system that year. By the 1966–67 school year, many of the white students returned to the public school system, but white attendance was still about one-third less than it had been before desegregation was commenced, having declined from 1,500 to 1,000.[342] Negro attendance has remained at approximately 6,000.

While white students returned to most of the public schools in the system in 1966–67, the public school boycott by whites in the Delta portion of the county remained complete.

Prior to the creation of the Tchula-Cruger Academy—a white private school in the Delta—the white public school had been a 12-grade school with 235 students and a pupil-teacher ratio of 16 to 1. As a result of the white boycott made possible by the establishment of the private school, by the 1966–67 school year the formerly white public school had become an eight-grade all-Negro school with approximately 90 students and 4 Negro teachers. As a result of faculty desegregation ordered by the district court, every white teacher at the school resigned and is now teaching in one of the all-white private schools in the county.

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[340] Information supplied by the Internal Revenue Service, March 2, 1967.

[341] *Alexander* v. *Holmes County Board of Education,* 10 Race Rel. L. Rep. 1089 (S.D. Miss. 1965).

[342] Staff interview with School Superintendent L. R. Thompson, Feb. 16, 1967.

Because of the decline in white attendance after the establishment of the private schools, the county public school system now receives proportionately less money from the State. This attrition in State funds is in turn felt in each school, so that the now all-Negro public school in the Delta qualifies for less money than it formerly received. Because the school has become an elementary school, all high school activities have ceased and facilities for them removed. All gymnasium, shop, and vocational agriculture equipment has been transferred to other schools. Bus transportation to the school has been terminated.

The private Tchula-Cruger Academy occupies a building formerly owned by the county school system and uses buses purchased from the county system. It has between 250 and 300 students, all of whom are white. Through the operation of Mississippi legislation passed in 1964, the school receives free textbooks and a tuition grant of $185 per student from the State. The private school presently has an application pending before the Internal Revenue Service for Federal tax benefits.

Hayneville, Alabama

During the 1965–66 school year, there were approximately 3,880 Negro children and 600 white children in the Lowndes County, Alabama public school system. The only desegregation in the system involved five Negro children who were attending previously all-white schools under a three-grade voluntary plan submitted to HEW.[343] The Department of Justice obtained a court order directing Lowndes County to improve its procedures for desegregation of its public schools on February 10, 1966.[344]

In the spring of 1965, when it became public knowledge that the school district intended to submit a desegregation plan to HEW, a number of parents of white children organized the Lowndes

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[343] Staff interview with Miss Hulda Coleman, Superintendent of Schools, Dec. 9, 1966.

[344] *United States* v. *Lowndes County Board of Education*, 11 Race Rel. L. Rep. 692 (M.D. Ala. 1966).

County Private School Foundation which was chartered on July 1, 1965.[345] Tax-exempt status and tax deductibility for donations were sought from the Internal Revenue Service and granted shortly thereafter, but no funds were solicited or collected. Following entry of the court order, however, the board of trustees of the foundation undertook to obtain contributions and locate a building and a faculty. By the opening of school in September 1966, the foundation had set up the Lowndes County Christian Academy and registered 225 white students.

The school had eight teachers, two of whom were from the Lowndes County public schools. Faculty salaries were equivalent to those in the public school system. Students were charged a $20 registration fee and $30 per month tuition with discounts to families with more than one child in the school. The school's present building was a former public school which had been donated by the school board to a local recreation association at the time it was abandoned. The foundation paid a nominal rent for use of the building. Transportation was not provided by the school but by groups of parents who purchased school buses.

The board of trustees contemplates constructing a new school building and hopes by 1975 to be able to accommodate approximately 500 students. As of December 1966, the Board had raised $100,000 in donations and had been given a plot of land upon which to build the proposed school. Construction of a football stadium already was under way.

An active civil rights organization had succeeded in encouraging 114 Negro students to enroll at the previously all-white Hayneville public school in the fall of 1966. The effect of the opening of nearby Lowndes County Christian Academy, however, was to reduce white high school attendance at the Hayneville public school from 178 during the 1965–66 school year to three as of December 1966.

Surry County, Virginia

Surry County, Virginia, operated a 12-grade all-white school, an elementary all-Negro school, and a 12-grade all-Negro school prior to the 1963–64 school year, when seven Negro children were placed in the previously all-white school by the Virginia State Pupil Placement Board.[346] By September 1963, all the white students and their teachers had transferred to a new private school, and the previously all-white school was closed by the school board.

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[345] Staff interviews with Ray Bass, chairman of the Board of Trustees of the Lowndes County Private School Foundation and T. H. Heath, headmaster of The Lowndes County Christian Academy, Dec. 9, 1966.

At the time of the staff visit in January of 1967, no white children were enrolled in the public school system and there were no white teachers in the system. The only white persons still connected with the system are the members of the school board, the school superintendent and two clerical employees.[347] Contributions to the Surry County Education Foundation, which operates the private schools, are tax deductible.[348]

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[346] *Pettaway* v. *County School Board of Surry County, Virginia,* 230 F. Supp. 480, 482 (E.D. Va. 1964) *aff'd and remanded,* 339 F.2d 486 (4th Cir. 1964).

[347] Staff interview with Superintendent of Schools M. B. Joyner, Jan. 6, 1967.

[348] The Foundation was granted tax-exempt status on Dec. 9, 1963.

10. EFFECT OF TITLE I OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AND ITS ADMINISTRATION

Title I of the Elementary and Secondary Education Act (ESEA) is designed to provide financial assistance to local educational agencies for the education of children of low income families.[349] Title I has provided eligible school districts with sufficient resources to widen considerably the scope of their efforts to meet the needs of poor children.

As indicated at the outset of this report, Federal aid to the States for education is constituting an increasingly significant portion of school budgets, in many cases more than 20 percent and in some cases more than 30 percent.[350] A large portion of this Federal aid is accounted for by Title I. For example, of $48.3 million in Federal financial assistance given to South Carolina in fiscal 1966 by the Office of Education, Title I accounted for $21.3 million. The comparable figures for other States, in fiscal 1966, were: *Georgia:* $33.8 million of $78.1 million; *Alabama:* $30.7 million of $67.9 million; *Louisiana:* $23.1 million of $55.1 million; *Mississippi:* $19.5 million of $44.5 million.[351]

Under Title I, the Commissioner of Education pays to each State "in advance or otherwise, the amount which the local educational agencies of that State are eligible to receive", pursuant to a complex formula.[352] The local educational agencies in turn may receive these funds from the appropriate State educational agency upon application therefor approved by the State agency.[353]

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[349] 20 U.S.C. 241a (Supp. 1966).

[350] See note 6 *supra.*

[351] Figures obtained from U.S. Office of Education, Budget Branch, Office of Administration, (Dept. HEW), April 1967.

[352] 20 U.S.C. at 241c, 241d, 241g (a)(1). Each State agency may withdraw its allotted funds monthly, by letter of credit, to fund the programs administered by the participating local educational agencies. Staff interview with John F. Staehle, Assistant Director for Policy and Procedures, Division of Compensatory Education (Office of Education), May 15, 1967.

A State desiring to participate in the Title I program must submit an application to the United States Commissioner of Education. The application must declare that payments will be made under Title I only for programs and projects which have been approved by the State educational agency;[354] that appropriate accounting procedures will be adopted to assure proper disbursement of and accounting for Federal funds paid to the State (including funds paid by the State to local educational agencies);[355] and that the State educational agency will submit to the Commissioner of Education (a) periodic reports evaluating the effectiveness of payments made and (b) such other reports as may be "reasonably necessary to enable the Commissioner to perform his duties" under Title I.[356]

Section 241e(a)(1) provides that a local educational agency may receive a "basic" or "special incentive" grant for "programs" and "projects" when its application is approved by the State educational agency upon the State agency's determination ("consistent with such basic criteria as the Commissioner of Education may establish") that such programs and projects (a) are designed to meet the "special educational needs" of "educationally deprived" children in "school attendance areas having high concentrations of children from low-income families," and (b) are of "sufficient size, scope, and quality to give reasonable promise of substantial progress" toward meeting such needs.

A local educational agency applying for a basic grant or a special incentive grant must set forth a project for an area composed of one or more school attendance areas having high concentrations of children from low income families.[357] The project area must be sufficiently restricted in size in relation to the nature of the applicable project as to avoid jeopardizing its effectiveness.[358] As a result, Title I money is channeled into "target schools" with concentrations of children from low-income families. In the South, such target schools typically are the Negro schools.[359]

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[353] 20 U.S.C. 241e(a)(1)-(8) and 241g(a)(2).

[354] *Id.* at 241f(a)(1).

[355] *Id.* at 241f(a)(2).

[356] *Id.* at 241f(a)(3).

[357] 45 C.F.R. 116.17 (a).

[358] *Id.* at 116.17 (b).

[359] In some places in the South, *e.g.*, Columbia, South Carolina, both white and Negro schools receive Title I funds.

Thus, Title I funds have been used to provide Southern Negro schools with library space and books, free food and clothing programs, free textbooks, remedial teachers and supplementary aids, services and equipment. While such aid is educationally beneficial, it has pointed up another weakness in the free choice method of desegregation. The upgrading of the Negro schools encourages Negro families to remain in such schools instead of exercising their option to choose formerly all-white schools. Under free choice, therefore, improvement of substandard Negro schools itself inhibits desegregation. As a result, the objectives of improving the quality of education and achieving desegregation conflict with, instead of complementing, each other.

A letter from a Georgia school superintendent illustrates the point. His school system opened an all-Negro elementary school in January 1966. Title I funds enabled the superintendent to stock the school with audio-visual aids, library books and playground equipment; provide it with a social worker and medical and dental services; give the students free lunches; pay the salaries of two additional teachers, and purchase $15,000 worth of miscellaneous school supplies, including water coolers and stage equipment. Writing to EEOP about his spring choice period, the superintendent noted that all the children in the "new modern" Negro elementary school chose to attend that school in 1966-67 (the district remained totally segregated). Factors "which had some bearing on this decision," he wrote, "are the new plant, additional teachers, 100 percent free lunch programs, and many additional services, materials, and supplies which are made available under Title I."[360]

In August 1966, the Commissioner of Education sent a letter to all Chief State School Officers (but not to individual school districts) in which he stressed that "it is not necessary . . . that the children selected for participation in Title I activities receive these services in schools in the low-income areas in which they reside" and encouraged the development of special educational assistance for them at locations outside their immediate attendance areas "provided such assistance is specifically designed to meet their special educational needs and the location offers special advantages, such as opportunities for learning in a widely representative social environment."[361]

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[360] Letter dated April 9, 1966, from Superintendent of Bleckley County, Ga., to Commissioner Howe.

Most local school superintendents interviewed by Commission staff subsequent to this letter, however, had not been notified of the new policy by their Chief State School Officer, and remained under the impression that a Title I project *had* to be located in a school having concentrations of students from low-income families. These school officials therefore continued to believe, for example, that free lunches paid for at a Negro school under Title I could not be provided to its former students if they transferred to a previously all-white school.

The Commissioner's August letter, moreover, though designed to encourage school authorities to make Title I services and benefits available to poor Negro children who attend predominantly white schools, did not *require* school officials to do so. On March 10, 1967, the Commissioner of Education did impose such a requirement. In a memorandum to the heads of all State educational agencies (but again, not to individual school districts), he emphasized the Office of Education policy that under Title I "the money follows the child." The Commissioner said: "No child who would otherwise participate in a Title I activity or service is to be denied such participation because of his exercise of the right to enroll in another school." Title I services, the memorandum said, may be offered in schools where most of the children are not included in designated poverty "target populations." Specific reference was made to special health, nutritional, and social services; guidance and counseling, and remedial programs. "In applying such services," the Commissioner stated, "consideration should be given to the special needs of the children in their new environment." The Commissioner urged the State authorities to disseminate the information to the local educational agencies in their States and to establish appropriate procedures for them to follow with respect to future Title I applications and amendments to applications so that the conditions in the memorandum are met.

Thereafter, on April 17, 1967, John F. Hughes, Director of the Division of Compensatory Education, circularized all Chief State

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[361] Letter dated Aug. 9, 1966. Policy memoranda and letters relating to Title I assistance are sent to the State educational agencies, rather than to participating local agencies. Staehle interview. There is no limitation, however, on the authority of the Office of Education to require, or itself make, distribution of such memoranda to the individual participating agencies. This is purely a matter of policy. *Ibid.*

School Officers and Title I (ESEA) Coordinators with a memorandum entitled "Criteria for the Appraisal of Applications for Grants under Title I, ESEA—Effective for all programs to be initiated after July 1, 1967." [362] The purpose of the memorandum is to "provide specific statements of the criteria which every Title I application is required to meet and to set forth the bases for determining whether those criteria have been met." [363] Criterion V states that Title I activities or services "will be offered at locations where the children can best be served in such a way as to foster integration." The explanatory comments state that "no child who would otherwise receive Title I services is to be denied such services because of his exercise of his right to enroll in another school" and "projects should be conducted in ways which will foster integration and avoid and eliminate racial, social, or linguistic isolation of children." The March 10 letter and April 17 memorandum, if successfully implemented, would reduce—but not eliminate—the conflict between Title I and school-desegregation in free-choice districts. Negro schools will continue to receive library space, books, and other equipment which formerly all-white schools will not receive.

That Title I funds have been employed in such a manner as to institutionalize and strengthen the dual school structure is apparent when the use of such funds in the construction of new school facilities is examined. In at least one district, for example, school authorities used Title I funds to purchase portable classrooms for overcrowded Negro schools.[364] In another district, Title I funds were used to build a vocational training shop midway between a white and a Negro school to be used separately by the children at each school.[365] In still another district, Title I funds supplied one-third of the money to add separate gymnasiums to white and Negro schools which were 1,000 yards apart.[366]

These examples were discovered by Title VI staff members in the course of their field investigations.[367] These investigations, however, are planned primarily on the basis of known progress by the school district in pupil and professional staff desegregation.[368] The construction of "separate-but-equal" facilities with the use of the Title I funds normally would not be detected by Title VI compliance staff in districts not visited.

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[362] Program Guide 36, approved by Associate Commissioner Nolan Estes.

[363] *Ibid.* See 20 U.S.C. 241e(a) for the Commissioner's authority to set up basic criteria which all programs must meet. See also 45 C.F.R. 116.16–116.25.

[364] *E.g.*, Drew Municipal Separate School District, Miss. Compliance Review Report, (EEOP document), pp. 2, 3.

[365] Laurel Municipal Separate School District, Miss. (Interview with Miss Sylvia Drew, EEOP summer employee, Aug. 31, 1966).

[366] Wheeler County, Ga. (Corrigan interview). For Regulations regarding the use of Title I funds for construction purposes, see 45 C.F.R. 116.21.

[367] The maintenance by a school district of "separate-but-equal" school facilities, of course, violates the guidelines. See 1966 guidelines at 181.12 and 181.14.

Although the Commissioner is empowered under Title I to establish basic criteria to insure that projects are designed to meet the needs of educationally deprived children,[369] and to enforce those criteria by withholding Title I funds from a defaulting State after a hearing,[370] the Commissioner has not established criteria expressly forbidding the use of Title I projects for the construction of racially separate facilities. Even if such a criterion were promulgated, or the April 17, 1967 policy memorandum were construed to forbid such projects, at present there is no adequate program of monitoring compliance with the Commissioner's Title I criteria.

Within the last year, some Title I personnel have been shifted to the field (three to Atlanta, one to Charlottesville, and one to Dallas).[371] Title I field personnel, however, are not considered program auditors. They are essentially supportive, and do not provide an independent Federal review of Title I programs. Program (as distinguished from fiscal) auditing is left entirely to the States. Even when responding to complaints about the operation of a program, Federal Title I field staff work through the State agency.[372]

Nor is the information submitted to Washington by the participating States sufficient to permit Federal officials to determine if the money is being used in such a way as to institutionalize and strengthen school segregation. The financial audit undertaken in Washington requires submission of statistical information showing the number of Negro, white, and other children participating in local educational agency projects, but the information required is projected from a sample, and the sample shows only the gross figures applicable to all the projects within a school district, not the figures applicable to each project. The figures, moreover, are not geared to a determination of whether the project is being used on an integrated basis.[373]

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[368] See *supra* p. 40.

[369] 20 U.S.C. 241e(a).

[370] *Id.* at 241j.

[371] The Charlottesville and Dallas representatives did not arrive at their posts until the fall of 1966. Staff interview ,with David G. Phillips, Program Specialist, Policy and Procedure Staff, Division of Compensatory Education (Office of Education), May 19, 1967 (Phillips interview). Phillips is deputy to John F. Staehle, Assistant Director for Policy and Procedures, Division of Compensatory Education.

[372] *Ibid.*

Each State also submits an evaluation report at the end of each year based on reports submitted to it by each of the participating local educational agencies.[374] But these reports, which are supposed to set out the progress of funded programs in meeting the special educational needs of educationally deprived children,[375] do not provide information which would show whether Title I funds are being used with the effect of strengthening school segregation.

Copies of the applications of local educational agencies for funding (which are made to the State educational agency for its approval) are sent to Washington, but these applications are not subjected to any review by Washington staff. In any case, they do not, as now drafted, provide information which would aid an administrator in determining whether a project funded by Title I has the effect of bolstering racially separate school facilities.

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[373] *Ibid.*

[374] 20 U.S.C. 241f(3)(a); Phillips interview.

[375] 20 U.S.C. 241f(3)(a); see also 20 U.S.C. 241e(a)(5).

11. FINDINGS

Extent of Desegregation

1. During the 1966–67 school year, the percentage of Negro children in the Southern States attending schools which were not all Negro more than doubled and, for the second straight year, rose at a rate greater than the increase in Negro student enrollment. Nevertheless, more than four-fifths of the Negro children in the 11 Southern States and more than nine-tenths of the Negro children in the five Deep South States still attend all-Negro schools.

2. In half of the border States a large majority of the Negro children attend schools less than 80 percent Negro. Comparatively few Negro children attend all-Negro schools in these States. In the other border States, more than one-third of the Negro pupils in each State attend all-Negro schools and a majority attend schools which are more than 95 percent Negro.

3. During the 1966–67 school year, in Southern States for which information is available, there was either no desegregation or only token desegregation of full-time teachers.

Free Choice Plans

4. In the Southern and border States most school districts in the process of desegregating their schools are doing so under free-choice plans.

5. There is serious doubt concerning the viability of freedom of choice as a means of disestablishing dual school structures. In most districts visited by Commission staff, school authorities conformed their procedures closely to the technical requirements of the 1966 guidelines governing notices, forms, publication procedures, and choice periods, but little actual desegregation was achieved. There has been virtually no desegregation of all-Negro schools under freedom of choice plans. During the past school year, as in the previous year, white students rarely chose to attend Negro schools.

6. Freedom of choice plans, which have tended to perpetuate racially identifiable schools in the Southern and border States, require affirmative action by both Negro and white parents and pupils before such disestablishment can be achieved. There are a number of factors which have prevented such affirmative action by substantial numbers of parents and pupils of both races:

(a) Fear of retaliation and hostility from the white community continue to deter many Negro families from choosing formerly all-white schools;

(b) During the past school year, as in the previous year, in some areas of the South, Negro families with children attending previously all-white schools under free choice plans were targets of violence, threats of violence and economic reprisal by white persons and Negro children were subjected to harassment by white classmates notwithstanding conscientious efforts by many teachers and principals to prevent such misconduct;

(c) During the past school year, in some areas of the South public officials improperly influenced Negro families to keep their children in Negro schools and excluded Negro children attending formerly all-white schools from official functions;

(d) Poverty deters many Negro families in the South from choosing formerly all-white schools. Some Negro parents are embarrassed to permit their children to attend such schools without suitable clothing. In some districts special fees are assessed for courses which are available only in the white schools;

(e) Improvements in facilities and equipment—such as those provided under Title I of the Elementary and Secondary Education Act—have been instituted in all-Negro schools in some school districts in a manner that tends to discourage Negroes from selecting white schools.

Title VI Enforcement

7. The Equal Educational Opportunities Program of the Office of Education made a significant advance in the administration of Title VI for the 1966–67 school year by greatly expanding its field investigation effort.

8. Many school districts fell far short of the Office of Education guidelines during the 1966–67 school year. The Office of Education

did not enforce the guidelines as written. Although the great majority of school districts in Alabama, Georgia, Louisiana, Mississippi, and South Carolina failed to meet the standards of the guidelines governing student transfers from segregated schools, only a small fraction of these districts have been subjected to enforcement action. Many specific prohibitions of the guidelines were not enforced. The lowering of enforcement standards stemmed in part from the fact that the staff of the Equal Educational Opportunities Program was not large enough to conduct all needed field investigations or to prepare and conduct timely proceedings against all school districts failing to comply with the guidelines.

9. The procedures employed by the Department of Health, Education, and Welfare in tabulating vital statistical information on school desegregation for the 1966–67 school year were initiated tardily and still are inadequate.

Districts Under Court Order

10. During 1966–67, there continued to be many school districts desegregating under court orders imposing standards lower than those imposed by the guidelines on districts desegregating under voluntary plans.

11. Many private segregated schools attended exclusively by white students have been established in the South in response to public school desegregation. In some districts such schools have drained from the public schools most or all of the white students and many white faculty members. Under the Internal Revenue Code of 1954, institutions organized and operated exclusively for educational purposes and not for private benefit are exempt from paying income taxes and contributors to these institutions are entitled to deduct contributions, within certain limits, from their taxable income. Some racially segregated private schools have been approved by the Internal Revenue Service for the receipt of these tax benefits, while others have applications for these benefits pending before the Internal Revenue Service.

12. CONCLUSIONS AND RECOMMENDATIONS

Almost three years have elapsed since the enactment of Title VI of the Civil Rights Act of 1964, and it is now possible to view with some perspective its efficacy as a means for securing desegregation of the public schools. The results have been both heartening and discouraging.

When performance under Title VI is measured against performance during the first decade after the Supreme Court's decision in *Brown* v. *Board of Education*, it is clear that significant progress has taken place. In the Southern States more Negro children have entered schools with white children during this period than during all of the 10 previous years. This numerical progress has been accompanied in many communities by a spirit of acceptance and understanding that would have seemed impossible during the era of "massive resistance" only a few years ago. Communities which then were considered bastions of defiance now have begun to desegregate their schools without any of the predictions of violence or the destruction of public education having come true. The fact that they have done so is in many cases a tribute to the courage and perseverance not only of Negro parents and children but also of individual school superintendents, public officials and community leaders who have recognized their responsibility to obey the law even in the face of opposition. The steps that have been taken in many communities to comply with Title VI provide ample proof of its potential as an instrument for securing the rights of citizens.

When, however, progress under Title VI is measured against the consitutional rights of Negro school children, it is clear that the task of securing compliance has only begun. This June, the vast majority of Negro children in the South who entered the first grade in 1955, the year after the *Brown* decision, were graduated from high school without ever having attended a single class with a single white student.

The Supreme Court's decision required the dismantling of the dual school systems in the South. Two years ago, the Court declared that "delays in desegregating school systems are no longer tolerable." Notwithstanding these facts, the dual system remains in most parts of the South. Most of the school districts throughout the Deep South and many school districts in other Southern States have provided for only token desegregation of formerly all-white schools. In almost every area of the South and in many border areas, school systems have continued to maintain wholly segregated all-Negro schools. More than 90 percent of all Negro children in the States of Mississippi, Alabama, Louisiana, Georgia and South Carolina attend such schools—schools which the Court has described as "inherently inferior"—and receive their education in circumstances which "affect their hearts and minds in ways unlikely ever to be undone."

In recent months, these facts—both the progress that has been made and the vast remaining areas of noncompliance—have tended to become obscured by a sustained attack upon the guidelines and their implementation. It has been charged that the guidelines are illegal, that they have been administered unfairly, and that they impose obligations on Southern States that are not imposed on the North.

These allegations do not withstand examination. The Federal Courts have upheld the guidelines not only as within the enforcement powers of the Office of Education, but as minimum standards, flowing directly from the 14th amendment, for the disestablishment of dual school systems. If there has been unfairness in the administration of the guidelines, it has stemmed in part from the fact that, hampered by inadequate manpower, the Office of Education has been able to enforce its standards only in some school districts, leaving others temporarily free to ignore the law. The victims of such unequal administration thus have been the Negro students in districts which have not received sufficient attention from HEW, not the school authorities who have been compelled to observe the guidelines.

It is true, we believe, that Negro youngsters who are educated in racially imbalanced or isolated schools in the North suffer harm not dissimilar from that inflicted in segregated schools in the South. For this reason, we recently have advocated the enactment by Congress of a uniform national standard under which racial imbalance in the public schools would be eliminated, North and South. But the need for such a standard provides no excuse for further delay in disestablishing a dual school system created by law in the Southern States.

We hope that this report and others like it will help to refocus national attention on what we regard as the real issue—whether further delays are permissible in affording Negro children their long deferred rights to equal educational opportunity. We do not suggest that progress is possible without dislocation and difficult adjustments. But these costs must be weighed against the costs of continuing disrespect for law, against the damage already sustained in the loss forever to a generation of Negro children of their right to a desegregated education and the prospect that the same loss may now be inflicted upon many thousands of children of a new generation.

Law has been the principal instrument for securing the rights of American citizens and for improving race relations in this Nation. Our failure to attain these goals is largely attributable to the failure to make our laws work. We do not believe that further delay in securing rights so fundamental as the right to equal educational opportunity will serve the real interests of any citizen or of the Nation.

In making recommendations, the Commission is guided by the central fact that emerges from this report: that while in many areas commendable progress toward desegregation has been made, particularly in recent years, the vast majority of Negro children in the South still are being denied the rights declared to be theirs by the Supreme Court's decision in the School Segregation Cases and the Civil Rights Act of 1964. If these rights are to be secured, this cannot be a time for retrenchment or wavering of purpose.

In carrying out its responsibilities, the Department of Health, Education, and Welfare should be governed by the following principles:

- The constitutional duty of every school district formerly segregated by law to dismantle its dual school system requires sub-

stantial desegregation of students and professional staff throughout the system;

- **Substantial desegregation of students cannot be achieved unless there is a rapid acceleration in the numbers of Negro students attending desegregated schools and in the pace under which schools which are all-Negro are eliminated;**
- **Professional staff should be desegregated so that schools are no longer racially identifiable on the basis of the race or color of the professional staff.**

The law is now clear that in school districts where racial segregation has been maintained in public schools with the sanction of law, school officials are under an affirmative obligation to reorganize the school system to undo the effects of the past discrimination, and that this obligation is not satisfied merely by abandoning the official policy of discrimination. In other words, school officials in such districts are under an affirmative duty to create an integrated, unitary system "in which there are no Negro schools and no white schools—just schools."[376]

Thus, the law measures compliance in terms of actual results. In measuring results, it is reasonable to expect that the South as a whole should meet the standard which much of the border State region already has met, *i.e.,* substantial desegregation throughout the school system, including extension of the benefits of desegregation to Negro children generally—not just to a fraction of the Negro student population—and the disestablishment of all-Negro schools as well as all-white schools.

Gearing enforcement to actual desegregation has distinct advantages over any alternative which would put HEW in the business of attempting to assess the type of plan which the school system should put into effect. Adequate supervision of plans (as well as local educational agency projects under the Elementary and Secondary Education Act) would require greater staff and greater Federal involvement than would be required in determining whether school systems have met a specified standard of desegregation.

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[376] See *United States* v. *Jefferson County Board of Education,* C.A. No. 23345, 5th Cir., March 29, 1967 (slip opinion at 5), *affirming on rehearing en banc* 372 F. 2d 836 (5th Cir. 1966). On the other hand in the North and West, Negro plaintiffs have been unable to prove to courts, except in a few cases, that the racial separation that exists there is the result of purposeful official discrimination. Because courts generally have not attributed this racial isolation to official policy, school officials in most cases have been held not to be under an affirmative duty to achieve an integrated school system. The Civil Rights Act of 1964, moreover, prevents the Department of Health, Education, and Welfare from requiring the assignment of students to public schools in order to overcome imbalance not resulting from past or present official policies of segregation or from purposeful discrimination.

To implement these principles the Department of Health, Education, and Welfare should establish the following requirements:

1. ***For the 1967–68 school year, each school district operating under a voluntary free choice plan should be required to fulfill the percentage expectations concerning student desegregation set forth in the 1966 guidelines, as amended;***

2. ***For the 1968–69 school year, and for each year thereafter, the Department of Health, Education, and Welfare should require for all districts which have not achieved substantial desegregation throughout the system a significant increase in the percentage of Negro students attending desegregated schools and in the pace under which all-Negro schools are being disestablished. Freedom of choice plans should be accepted only where the school district shows that it has met the standards of the guidelines and there has been no harassment or intimidation of Negro parents or children in connection with the exercise of choices.***

Most school districts currently desegregating pursuant to a voluntary plan are using "freedom of choice" plans. The review of desegregation under freedom of choice plans contained in this report, and that presented in last year's Commission's survey of southern school desegregation, shows that the freedom of choice plan is inadequate in the great majority of cases as an instrument for disestablishing a dual school system. Such plans have not resulted in desegregation of Negro schools and therefore perpetuate one-half of the dual school system virtually intact. They also place an unreasonable burden on Negro families. In many areas of the South a Negro family chooses a formerly all-white school on pain of hostility from persons in the white community, and at the risk of physical harm to the parents or the children, harassment of the children in school, and economic reprisal including eviction or loss of credit or employment. There is evidence that these risks are important factors in the decisions of Negro families to keep their children in Negro schools.

Because the 1967–68 school year is almost at hand, the Commission does not recommend any changes in the guidelines, but does recommend that the Department of Health, Education, and Welfare require school districts operating under freedom of choice plans to achieve the measure of school desegregation set forth in the guidelines as expectations. For succeeding years school desegregation in all voluntary plan districts should be measured by the results achieved. The appropriate measure should be the percentage of Negro children in school with substantial numbers of white children, rather than the percentage of Negro children transferring from segregated schools. Because freedom of choice has not produced substantial desegregation in the great majority of school districts, and because assignment based on choice of schools should not be permitted where Negro parents or children are harassed or intimidated, a school district should be required to adopt an alternative plan unless it shows that it has complied with the standards of the guidelines and there has been no such harassment or intimidation.

3. *The Department of Health, Education, and Welfare should require that, by the 1968–69 school year, schools no longer be racially identifiable on the basis of the racial composition of the faculty or staff. For the 1967–68 school year, the Department should require substantial progress toward that end.*

The Federal Courts have ruled that faculty and staff desegregation are necessary to dismantle a dual school system.[377] In two Courts of Appeals decisions and in two District Court cases they have required that the racial composition of the faculty and staff reflect the racial composition of the faculty and staff of the school district.[378] Faculty and staff desegregation is vital in eliminating the racial identification of schools, which retards actual integration of students under freedom of choice plans. The standard for faculty and staff desegregation should be the elimination of the racial identifiability of schools on the basis of the racial composition of the faculty or staff. The present requirements of the guidelines, as implemented by the Department of Health, Education, and Welfare, fall far short of that goal.

4. *All other provisions of the guidelines should be*

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[377] See Appendix VI.
[378] *Ibid.*

firmly and consistently enforced and any failure or refusal to comply with the requirements or standards of the guidelines should result in prompt commencement of enforcement proceedings if efforts to obtain voluntary compliance fail. The Department of Health, Education, and Welfare should supplement its reporting requirements to insure that the provisions of the guidelines requiring (1) the closing of segregated schools with inferior facilities or inferior educational programs; (2) desegregation of extracurricular activities, and (3) desegregation and reorganization of transportation systems, are being met.

This report shows that many of the specific provisions of the guidelines were not enforced during the 1966–67 school year, including those relating to desegregation of transportation and extracurricular activities and those relating to the closing of small Negro schools with inferior facilities or programs. In addition to assuring compliance with the rules implementing the standard of substantial desegregation of students throughout the system, and the standard for desegregation of faculty and staff, these specific provisions—which also are intended to secure constitutional rights—should be enforced.

5. *The Department of Health, Education, and Welfare should review the enforcement procedures relating to all aspects of school desegregation to ensure that desegregation requirements are firmly and consistently applied and that districts similarly circumstanced are treated alike.*

School desegregation standards should be applied consistently to all school districts. Uneven application of requirements impairs the credibility and effectiveness of the enforcement program. Once a requirement is laid down, it should be enforced firmly.

6. *The Attorney General should request the courts to revise existing school desegregation orders to comply with the standards previously set forth.*

School systems should be treated alike, whether or not they have been involved in school desegregation litigation. The Attorney General therefore should seek judicial modification of present school desegregation orders to comply with the requirements suggested in these recommendations.

7. ***The Department of Health, Education, and Welfare should review the current procedures for gathering school desegregation statistics and adopt uniform procedures designed to expedite the collection of all relevant statistics and the compilation of such statistics in a form easily usable by the Department and readily accessible to all interested government agencies and private persons.***

Neither the Department of Health, Education, and Welfare nor interested government agencies and private persons can evaluate accurately the progress being made in public school desegregation, the areas of difficulty, or the status of compliance without easy access to tables or charts containing all relevant data collected according to uniform standards for all school districts in Southern and border States. At a minimum these tables or charts should contain for each district the number of students by race and grade of each school, and the number of faculty members of each race assigned to each school, for the current school year. Since interested private citizens have the right to know the results of school desegregation under Title VI and to judge the effectiveness of the Department's efforts to obtain compliance, this information should be made available to such citizens as well as to interested government agencies.

8. ***Congress should appropriate funds sufficient to enable the Department of Health, Education, and Welfare to meet estimated manpower requirements for Title VI enforcement.***

The Department of Health, Education, and Welfare cannot discharge its Title VI responsibilities with insufficient staff. During the 1966–67 school year, HEW's compliance officers handled approximately 48 school districts per person. Lack of sufficient staff was responsible in part for significant dilution of desegregation requirements and standards during the 1966–67 school year and for the failure to apply the guidelines with an even hand.

9. ***Congress should enact legislation specifically authorizing any Negro child, and his parents, to bring a civil action for injunctive relief and damages against private persons who harass or intimidate him in any manner because of his race and his enrollment or attendance at any public school, or to discourage or prevent him because of his race or any***

other person or class of persons of a particular race, from participating in such activity. The Attorney General should be authorized to sue on behalf of such a victim for injunctive relief. Criminal sanctions should be imposed against any persons, whether acting under color of law or otherwise, engaging or attempting to engage in such harassment or intimidation.

Existing Federal law is inadequate to deal with harassment and intimidation of Negro parents and children who seek to exercise the right to a desegregated education. Although Title IV of the Civil Rights Act of 1964 authorizes the Attorney General, in certain circumstances, to initiate desegregation suits for injunctive relief, the Title does not authorize him, or the victims themselves, to bring suit against private individuals to prevent interference with the exercise of the right to a desegregated education.

Another statute, 42 U.S.C. 1985 (3), provides that "if two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . ." the victim may bring a damage action against any one of the conspirators. But harassment and intimidation are not necessarily conspiratorial in character. It makes little sense to exempt an individual from accountability because he bears undivided responsibility for the misdeed. Federal law should authorize the victim to sue for injunctive relief or damages, whether the interference is conspiratorial or individual in character.

The law also should clearly grant a cause of action when the interference or attempted interference with the Federal right takes the form of economic sanctions, such as dismissal from a job or eviction from a plantation. The Attorney General should be empowered to sue for injunctive relief in behalf of the victim, who in many cases may be too poor or frightened to bring a lawsuit. In addition, Congress should enact legislation specifically making intimidation—including economic intimidation—to punish or discourage the exercise of the right to attend a desegregated school a Federal crime.

The proposed Civil Rights Act of 1967—the Administration bill submitted to Congress (S. 1026, 90th Cong., 1st Sess.)—contains a

Title (Title V, denominated "Interference With Rights") imposing criminal sanctions against any public official or private individual who, by force or threat of force, injures or interferes with or attempts to injure or interfere with any person because he is of a particular race or color and because of his enrollment or attempted enrollment in any public school, or in order to discourage or prevent him because of his race, or any other person or class of persons of a particular race, from such enrollment. This Title, however, while it authorizes the victim to sue for injunctive relief or damages against persons violating the Title, does not apply to acts of economic intimidation or coercion and does not authorize the Attorney General to sue for injunctive relief on behalf of the victim.

10. ***The Secretary of the Treasury should request an opinion of the Attorney General as to whether Title VI of the Civil Rights Act of 1964 or the Internal Revenue Code authorizes or requires the Internal Revenue Service to withhold tax benefits presently being afforded by the Service to racially segregated private schools, or whether congressional action is necessary to assure that such benefits are withheld. The Attorney General should consider whether, because of such benefits, the Federal Government is so significantly involved in private school segregation as to justify legal action to enjoin the continued operation on a discriminatory basis of schools receiving such benefits. If the Attorney General determines that present legal authority is inadequate either to withhold tax benefits or to permit the institution of litigation, he should recommend appropriate legislation to the President.***

The growth of private schools in the South—many established solely for the purpose of avoiding public school desegregation—presents significant issues of law and public policy. If this trend were to continue, it would pose a threat to the public school system, a matter which should be of concern to teachers, administrators and others who are committed to the preservation of our public schools.

Federal financial assistance to racially segregated schools, whether public or private, is prohibited by Title VI of the Civil Rights Act of 1964. Whether Federal tax benefits presently enjoyed by racially segregated private schools in the form of tax exemption and tax deductibility for contributions are a form of Federal financial assistance and prohibited by Title VI is a substantial question. Similarly, to the extent that the Internal Revenue Code of 1954 imposes a general public benefit requirement for eligibility for Federal tax benefits, the Code itself may prohibit Federal tax assistance to private schools which exclude members of a particular race.[379] Of course, the yielding up of Federal financial assistance in the form of tax benefits would be a decision for the private schools themselves to make. Such assistance would be continued if the schools agreed to desegregate. These questions presently are before the Internal Revenue Service, which should have the guidance of the Attorney General.

In addition, legal remedies may be available in courts under existing law to enjoin the continued operation of private schools *on a discriminatory basis while Federal tax benefits continue to flow to such schools* on the ground that the Federal Government's involvement renders their segregated operation violative of the Fifth Amendment.

If the Attorney General concludes either that there is no authority to permit withholding of tax benefits or inadequate authority to institute legal action, he should recommend to the President appropriate legislation.

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[379] Denying tax benefits to racially segregated private schools would not mean that such benefits also must be denied other institutions such as parochial schools and private clubs that may exclude persons for racial or religious reasons. See Appendix VIII for a staff paper presenting a legal analysis of the issues related to this recommendation.

APPENDIX I

U. S. DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
Office of Education

ENROLLMENT OF NEGRO PUPILS IN SOUTHERN AND BORDER STATES

Measuring progress in school desegregation involves a judgment as to whether to include in the count the Negro students in virtually all-Negro schools (over 95% Negro), since these schools have few white or other non-Negro students.

The following figures show two different breakdowns: one includes the Negro students in the schools with 95% or more Negroes; the other excludes these students.

Percentage of Negro Students in School with Whites

	1965	*1966*	*1966*
	(Schools 95 percent-or-more Negro Included)		(Schools 95 percent-or-more Negro Excluded)
17 Southern and Border States	*15.1*	*24.4*	*16.6*
11 Southern States	*7.5*	*16.9*	*12.5**
6 Border States	*65.6*	*67.8*	*43.8*

The 1965 U.S. Office of Education data were based on a sample survey. The 1966 percentages are based on data collected this fall from approximately 80 percent of the 5,000 school districts in the border and Southern States. The Southern States are: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. The border States are: Delaware, Kentucky, Maryland, Missouri, Oklahoma, and West Virginia.

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* The comparable figure for this in 1965 was about 6% according to other surveys.

Data also were gathered on faculty desegregation. While an analysis of this data has not been completed, it indicates that a large majority of southern school districts have made at least a start in desegregation of faculty.

The States showing the smallest percentage of Negro students attending predominantly white schools in the current school year are Alabama, Georgia, Louisiana, Mississippi, and South Carolina. In Alabama, 2.4 percent of Negro students go to schools where they make up less than 95 percent of the student body. The comparable percentage is 3.2 in Mississippi, 3.6 in Louisiana, 4.9 in South Carolina, 6.6 in Georgia, 12.8 in North Carolina, 14.7 in Florida, and 15.9 in Arkansas.

The Southern States with the largest percentage of Negro pupils going to school with whites are Texas, Tennessee, and Virginia. Texas has 34.6 percent of its Negro students attending schools where they make up less than 95 percent of the enrollment. In Tennessee, the comparable percentage is 21.9 and in Virginia 20.

Among the border States, Kentucky has 88.5 percent of its Negro students in this category, Delaware 84.8 percent, West Virginia 83.4 percent, Maryland 40.5 percent, Oklahoma 40.5 percent, and Missouri 26.7 percent.

Table 1.—Enrollment in All Schools and Negro Enrollment in Schools by Percentage of Negroes in Student Body, 17 Southern and Border States, Fall 1966

State	Enrollment in All Schools			Negroes	Negro Enrollment in Schools by Percent of Negro Student Body							
	Total	White	Negroes	Percent of total	0–20%		20–80%		80–99.9%		100%	
					Number	%	Number	%	Number	%	Number	%
1	2	3	4	5	6	7	8	9	10	11	12	13
GRAND TOTAL...	14,847,000	11,445,700	3,401,300	22.9	318,820	9.4	219,020	6.4	291,920	8.6	2,571,540	75.6
Southern States, Total...	11,285,800	8,385,900	2,899,900	25.7	241,350	8.3	108,900	3.8	139,650*	4.8	2,410,000	83.1
Alabama	845,000	571,200	273,800	32.4	6,350	3.2	300	0.1	6,250	2.3	260,900	95.3
Arkansas	434,700	316,500	118,200	27.2	13,150	11.1	5,650	4.8	750	0.7	98,650	83.4
Florida	1,260,100	980,400	279,700	22.2	31,650	11.3	8,950	2.3	17,550	6.3	221,550	79.2
Georgia	1,073,700	731,200	342,500	31.9	17,150	5.0	5,200	1.5	11,700	3.4	308,450	90.1
Louisiana	820,700	557,300	263,400	32.1	4,550	1.7	2,350	0.9	2,450	0.9	254,050	96.5
Mississippi	585,000	321,800	263,200	45.0	6,100	2.3	800	0.3	1,600	0.6	254,700	96.8
North Carolina	1,183,700	833,300	350,400	29.6	33,450	9.5	10,900	3.1	10,400	3.0	295,650	84.4
South Carolina	642,400	395,100	247,300	38.5	10,400	4.2	1,400	0.6	2,950	1.2	232,550	94.0
Tennessee	874,300	688,900	185,400	21.2	22,900	12.3	15,950	8.6	20,000	10.8	126,550	68.3
Texas	2,563,100	2,224,800	338,300	13.2	64,400	19.0	43,900	13.0	51,750	15.3	178,250	52.7
Virginia	1,003,100	765,400	237,700	23.7	31,250	13.1	13,500	5.7	14,250	6.0	178,700	75.2
Border States, Total	3,561,200	3,059,800	501,400	16.4	77,470	15.4	110,120	22.0	152,270	30.4	161,540	32.2
Delaware	112,600	88,500	24,100	21.4	3,450	14.3	13,690	56.8	6,960	28.9	0	0
Kentucky	674,500	631,300	43,200	6.4	24,360	56.4	11,790	27.3	2,070	4.8	4,980	11.5
Maryland	790,900	571,200	219,700	27.8	19,150	8.7	47,400	21.6	74,000	33.7	79,150	36.0
Missouri	963,800	833,800	130,000	13.5	10,140	7.8	17,940	13.8	55,380	42.6	46,540	35.8
Oklahoma	598,400	536,800	61,600	10.3	12,870	20.9	7,760	12.6	13,680	22.2	27,290	44.3
West Virginia	421,000	398,200	22,800	5.4	7,500	32.9	11,540	50.6	180	0.8	3,580	15.7

* About 117,000 of these pupils (or 84%) are in schools which are over 95% Negro.

U.S. Office of Education
National Center for Educational Statistics
12/6/66

Table 2.—Enrollment, by Race in All Schools, and Enrollment of Negro Students in Schools with both White and Negro Students in Southern and Border States, by State: Fall 1965 and Fall 1966

(Note: 1965 figures exclude districts with total enrollment under 300, while 1966 figures include these numbers.)

State	Enrollment in all Schools								Number of Negro Pupils in Schools which are not 100% Negro		Negro Pupils in Schools which are not 100% Negro as a percentage of all Negro Pupils	
	Total		Not Negro		Negro		Negro as Percent of Total					
	Fall 1965	Fall 1966	Fall 1965	Fall 1966	Fall 1965	Fall 1966	Fall 1965	Fall 1966	Fall 1965	Fall 1966	Fall 1965	Fall 1966
1	2	3	4	5	6	7	8	9	10	11	12	13
GRAND TOTAL	14,269,500	14,847,000	10,938,800	11,445,700	3,330,700	3,401,300	23.3	22.9	503,600	829,760	15.1	24.4
Southern States, Total	10,891,700	11,285,800	7,998,200	8,385,900	2,893,500	2,899,900	26.6	25.7	216,600	489,900	7.5	16.9
Alabama	827,700	845,000	541,100	571,200	286,600	273,800	34.6	32.4	15,300	12,900	5.3	4.7
Arkansas	438,800	434,700	341,600	316,500	97,200	118,200	22.2	27.2	6,100	19,550	6.3	16.6
Florida	1,214,000	1,260,100	929,300	980,400	284,700	279,700	23.5	22.2	23,800	58,150	8.4	20.8
Georgia	1,057,300	1,073,700	737,000	731,200	320,300	342,500	30.3	31.9	7,600	34,050	2.4	9.9
Louisiana	780,300	820,700	507,600	557,300	272,700	263,400	34.9	32.1	1,600	9,350	0.6	3.5
Mississippi	567,400	585,000	292,500	321,800	274,900	263,200	48.4	45.0	1,000	8,500	0.4	3.2
North Carolina	1,168,900	1,183,700	789,300	833,300	379,600	350,400	32.5	29.6	24,500	54,750	6.5	15.6
South Carolina	633,900	642,400	400,500	395,100	233,400	247,300	36.8	38.5	3,500	14,750	1.5	6.0
Tennessee	863,000	874,300	682,900	688,900	180,100	185,400	20.9	21.2	25,300	58,850	14.0	31.7
Texas	2,358,300	2,563,100	1,981,300	2,224,800	377,000	338,300	16.0	13.2	81,700	160,050	21.7	47.3
Virginia	986,100*	1,003,100	798,300*	765,400	187,800*	237,700	19.0	23.7	26,300	59,000	14.1	24.8
Border States, Total	3,377,800	3,561,200	2,940,600	3,059,800	437,200	501,400	12.9	16.4	287,000	339,860	65.6	67.8
Delaware	106,500	112,600	86,100	88,500	20,400	24,100	19.2	21.4	15,900	24,100	77.9	100.0
Kentucky	661,500	674,500	599,000	631,300	62,500	43,200	9.4	6.4	50,900	38,220	81.4	88.5
Maryland	758,700	790,900	585,700	571,200	173,000	219,700	22.8	27.8	96,400	140,550	55.7	64.0
Missouri	892,200	963,800	777,300	833,800	114,900	130,000	12.9	13.5	85,500	83,460	74.4	64.2
Oklahoma	529,300	598,400	480,700	536,800	48,600	61,600	9.2	10.3	24,800	34,310	51.0	55.7
West Virginia	429,600	421,000	411,800	398,200	17,800	22,800	4.1	5.4	13,500	19,220	75.8	84.3

* Corrected figures supplied by staff of National Center for Educational Statistics.

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	Negro pupils attending schools Less than 95% Negro		Negro pupils attending schools 95 to 99.9% Negro		Negro pupils attending schools 100% Negro	
	%	Number	%	Number	%	Number
TOTAL 17 States	17.3	589,680	7.0	237,990	75.7	2,573,190
Southern States	12.5	363,350	4.3	124,380	83.2	2,411,650
Alabama	2.4	6,570	2.3	6,300	95.3	260,900
Arkansas	14.5	17,200	0.6	700	84.9	100,300
Florida	14.7	41,120	6.1	17,060	79.2	221,550
Georgia	6.6	22,610	3.3	11,300	90.1	308,450
Louisiana	2.6	6,850	.9	2,370	96.5	254,050
Mississippi	2.6	6,840	.6	1,580	96.8	254,700
North Carolina	12.8	44,850	2.8	9,810	84.4	295,650
South Carolina	4.9	12,120	1.1	2,720	94.0	232,550
Tennessee	21.9	40,600	9.8	18,170	68.3	126,550
Texas	34.6	117,050	12.7	42,960	52.7	178,250
Virginia	20.0	47,540	4.8	11,410	75.2	178,700
Border States	45.1	226,330	22.7	113,610	32.2	161,540
Delaware	84.8	20,440	15.2	3,660	0	0
Kentucky	88.5	38,230	0	0	11.5	4,980
Maryland	40.5	88,980	23.5	51,630	36.0	79,150
Missouri	26.7	34,710	37.5	48,750	35.8	46,540
Oklahoma	40.5	24,950	15.2	9,360	44.3	27,290
West Virginia	83.4	19,020	.9	210	15.7	3,580

U.S. Office of Education
National Center for Educational Statistics
12/9/66 (Corrected copy)

Estimated Percentage of Negro Pupils in Schools Which are 100% Negro in Southern and Border States, Fall 1966 vs. Fall 1965

State	1966	1965
Seventeen Southern and Border States	75.6	84.9
Eleven Southern States	83.1	92.5
Alabama	95.3	94.7
Arkansas	83.4	93.7
Florida	79.2	91.6
Georgia	90.1	97.6
Louisiana	96.5	99.4
Mississippi	96.8	99.6
North Carolina	84.4	93.5
South Carolina	94.0	98.5
Tennessee	68.3	86.0
Texas	52.7	78.3
Virginia	75.2	85.9
Six Border States	32.2	34.4
Delaware	0	22.1
Kentucky	11.5	18.6
Maryland	36.0	44.3
Missouri	35.8	25.6
Oklahoma	44.3	49.0
West Virginia	15.7	24.2

U.S. Office of Education
National Center for Educational Statistics
12/7/66

APPENDIX II

DISTRICTS CITED FOR POOR PERFORMANCE

As of April 14, 1967[1]

ALABAMA

School District	*Percentage of Student Desegregation*[2] (Negro students in formerly all-white schools)
Alexander City	2.9
Andalusia City	1.1
Athens City	3.5
Autauga Co.	1.34
Blount Co.	0
Butler Co.	.8
Cherokee Co.	5.3
Clay Co.	1.16
Coffee Co.	.9
Elba City	.5
Lamar Co.	1.2
Limestone Co.	2.8
Monroe Co.	.2
Opp City	Had desegregated all 10 Negro children in system but transferred out 174 Negro students.
Randolph Co.	.7
Roanoke City	Had desegregated all 30 Negro children in system but transferred out 300–400 Negro students.
St. Clair Co.	4.2
Sumter Co.	.34
Sylacauga City	2.4

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[1] One district (Echols Co., Georgia) has been terminated for poor performance. Department of Health, Education, and Welfare, *Status of Title VI Compliance Interagency Report*, List No. 50. The remaining 50 districts terminated were districts cited for failure to file any desegregation plan, an acceptable desegregation plan, or a 441–B assurance. Of the 50, 16 have come back into compliance, 15 by filing court orders, and one by filing an acceptable voluntary plan. Memorandum from Miss Marilyn Galvin, Education Research and Program Assistant, (EEOP), to Joshua B. Zatman, Director, Resources and Materials, (EEOP), April 6, 1967.

[2] Unless otherwise indicated, percentage figures came from summaries prepared by the EEOP staff which accompany recommendations for enforcement action. Unless otherwise indicated, faculty desegregation did not meet EEOP standards.

ARKANSAS

School District	*Percentage of Student Desegregation*
Arkansas City	0
Desha Co.	0[3]
Lawson No. 71	0
New Edinburg	0
Strong No. 83	0
Village No. 30	5[4]
Wilmot Co.	0

FLORIDA

Flagler Co.	0

GEORGIA

Americus Co.	2.5[5]
Appling Co.	.3
Bleckley Co.	0
Dooly Co.	1
Echols Co.	0[6]
Elbert Co.	.3
Evans Co.	.3
Hart Co.	.6
Jenkins Co.	0
Johnson Co.	0
Jones Co.	1.1
Lamar Co.	.6
Lincoln Co.	.3
Madison Co.	1.5
McDuffie Co.	.7
Miller Co.	.4
Morgan Co.	.7
Stewart Co.	.4

MISSISSIPPI[7]

Bay St. Louis Mun. Sep.	0
Brookhaven Mun. Sep.	.12[8]
Choctaw Co.	0[9]
Coffeeville Consol.	0[10]
Drew Mun. Sep.	.47
East Jasper Co.	.376[11]
East Tallahatchie Consol.	.10[12]
Forest Mun. Sep.	.40[13]
Jefferson Davis Co.	1.5[14]

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[3] Faculty index of 1.2.

[4] Percentage based on actual Fall enrollment figures.

[5] Non-filer until Nov. 1966.

[6] The figure for Echols County is based on the Fall, 1966, report of the school system. According to the superintendent, some Negro children now are attending formerly all-white schools. Summary report recommending enforcement action.

[7] Statistical information supplied by EEOP Area II staff unless otherwise noted.

[8] Percentage taken from EEOP summary report recommending enforcement action.

[9] Faculty Desegregation Index of 1.02.

[10] Faculty Desegregation Index of 1.00.

[11] Percentage taken from EEOP summary report recommending enforcement action.

[12] *Ibid.*

[13] No faculty information.

[14] Percentage taken from EEOP summary report recommending enforcement action.

MISSISSIPPI—Continued

School District	*Percentage of Student Desegregation*
Lauderdale Co.	.38
Laurel Mun. Sep.	3.06
Lincoln Co.	0
Marion Co.	.83[15]
Monroe Co.	0[16]
Montgomery Co.	.55
Neshoba Co.	.54[17]
Nettleton Line Consol.	1.3
Newton Co.	.43
Oakland Consol.	0
Okitbbeha Co.	.5
Perry Co.	.91[18]
Picayune Mun. Sep.	.39
Pontotoc Co.	0
Pontotoc Mun. Sep.	All Negroes attended county schools.
Poplarville Spec. Mun.	0
Quitman Co.	2.2[19]
Richton Mun. Sep.	0
Scott Co.	1.4[20]
Simpson Co.	1.35
Smith Co.	[21]
Stone Co.	1.17
Union Mun. Sep.	All Negroes attended school in another county.
Walthall Co.	.16[22]
Wayne Co.	0[23]
Webster Co.	0[24]

NORTH CAROLINA

Caswell Co.	.8
Chowan Co.	.6
Elm City	2.2
Franklinton City	1.0
Fremont City	.2
Henderson City Admin. Unit	4.5
Hyde Co.	.8[25]
Jones Co.	4.38
Lenoir Co.	.3
Martin Co. Admin. Unit	3.4
Maxton City	.9
Morven City	1.9
Nash Co.	1.38
Sampson Co.	2.2
Vance Co.	2.4
Wilson Co.	.8[26]

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[15] Percentage based on actual Fall enrollment figures.
[16] Percentage taken from EEOP summary report recommending enforcement action.
[17] No faculty information.
[18] Percentage based on actual Fall enrollment figures.
[19] *Ibid.*
[20] Percentage taken from EEOP summary report recommending enforcement action.
[21] Information deemed inadequate. Zero student desegregation estimated.
[22] Percentage based on actual Fall enrollment figures.
[23] *Ibid.*
[24] Faculty Desegregation Index of 1.3.
[25] Faculty Desegregation Index of .75.
[26] Faculty Desegregation Index of 1.

SOUTH CAROLINA

School District	*Percentage of Student Desegregation*
Bowman Co. No. *2*	*1.6*
Chesterfield Co. No. *3*	*0*
Clarendon Co. No. *3*	*1.1*
Dillon Co. No. *3*	*.59*
Dorchester Co. No. *2*	*3.7*
Dorchester Co. No. *3*	*0*[27]
Florence Co. No. *2*	*.72*
Florence Co. No. *5*	*.9*
Lee Co.	*.7*
Marion Co. No. *1*	*.5*
Marion Co. No. *3*	*.4*
Orangeburg Co. No. *2*	*1.6*

TENNESSEE

Brownsville City[28]	*6.7*
Haywood Co.[29]	*1.1*
Lauderdale Co.	*3.0*
Hardeman Co.	*5.7*

TEXAS

Groesbeck Independent	*6.4*

VIRGINIA

Appomattox Co.	*.9*[30]
Charlotte Co.	*3.4*
Essex Co.	*2*
Franklin Co.	*2.3*
Lancaster Co.	*4.4*
Mecklenburg Co.	*1.14*
Northumberland Co.	*1.8*
Southampton Co.	*2.0*[31]
Sussex Co.	*1.6*

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[27] No reports filed. Information based on EEOP field investigation.

[28] In this district HEW enforcement proceedings have been suspended and the Department of Justice has brought suit.

[29] *Ibid.*

[30] Calculation made by Commission staff from figures contained in EEOP summary report recommending enforcement action.

[31] Estimate submitted by school district to EEOP.

APPENDIX III

STUDENT DESEGREGATION IN DISTRICTS VISITED BY COMMISSION STAFF

ALABAMA

School District	*Type of Plan*[1]	*Percentage of Student Desegregation*[2]
Birmingham City	Court order[3]	1.6
Butler Co.	Free choice	.86
Choctaw Co.	Court order (free choice)	1.7
Demopolis City, S.D.	Free choice	[4]
Greene Co.	Court order (free choice)	.82
Hale Co.	Court order (free choice)	[5]
Lowndes Co.	Court order (free choice)	3.3
Marengo Co.	Free choice[6]	0
Pike Co.	Free choice	.62
Talladega Co.	Free choice	1.8

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[1] Where only the type of plan is indicated, the district is desegregating under EEOP supervision *i.e.*, has filed a 441–B assurance of compliance.

[2] Figures in this column represent student desegregation (Negro students in formerly all-white schools) at the time of staff visits as reported to EEOP or Commission staff. In some instances court order districts did not have statistics available at the time of Commission visits and in these few instances figures were obtained from EEOP after Commission staff visits were completed. Where available information was insufficient to establish a percentage figure, we have shown the actual number of Negro students in formerly all-white schools at the time Commission staff visited the school district, except where such information was unavailable.

[3] Mixed transfer and free choice plan.

[4] Demopolis City had not filed a 441–B assurance with the Office of Education at the time of the staff visit. At the time of the Commission visit 31 Negro students were attending formerly all-white schools.

[5] At the time of the Commission visit there were approximately 55 Negro students in formerly all-white schools.

[6] Marengo County had not filed a 441–B assurance with the Office of Education at the time of the staff visit.

ARKANSAS

School District	*Type of Plan*	*Percentage of Student Desegregation*
Desha Co.	Free choice	*0*
Eudora S.D. (Chicot Co.)	Free choice	*1.3*
Manila No. *15* (Mississippi Co.)	[7]	
Marianna S.D.	Free choice	*1.9*
Marion (Crittenden Co.)	Free choice	*.85*
Marvell S.D. No. *22*	[8]	

FLORIDA

Duval Co.	Court order[9]	[10]
Flagler Co.	Free choice	

GEORGIA

Baker Co.	Free choice	*7.2*
Crisp Co.	Free choice	*6.65*
Dooly Co.	Free choice	*.90*
Dougherty Co.	Court order (free choice)	*8.4*
Evans Co.	Free choice	*.35*
McIntosh Co.	Free choice	*4.5*
Terrell Co.	Free choice[11]	*.30*

LOUISIANA

Ascension Parish	Court order (free choice)	[12]
Beauregard Parish	Free choice	*3.0*
Bossier Parish	Court order (free choice)	*.96*
Caddo Parish (Shreveport)	Court order (free choice)	*.028*[13]
St. James Parish	Court order (free choice)	*1.69*
Vernon Parish	Free choice	*.14*

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[7] This school district was operating under a form 441 assurance.

[8] No desegregation plan was in effect at the time of the staff visit. The district is now under court order.

[9] Geographic zoning with limited transfer right.

[10] At the time of the Commission visit there were 80 Negro students attending formerly all-white schools.

[11] Terrell County had not filed a 441–B assurance with the Office of Education at the time of the staff visit.

[12] At the time of the Commission visit there were 46 Negro students attending formerly all-white schools.

[13] Seven Negro students were in formerly all-white schools out of a Negro student population of 24,467.

School District	*Type of Plan*	*Percentage of Student Desegregation*
MARYLAND		
Dorchester Co.	**Free choice**	***5.04***
Somerset Co.	**Free choice**	***6.2***
MISSISSIPPI		
Aberdeen Mun. Sep. S.D. (Monroe Co.)	**Court order (free choice)**	***2.2***
Chickasaw Co.	**Free choice**	***.30***
Claiborne Co.	**Free choice**	***2.4***
Clay Co.	**Court order (free choice)**	***.99***
Hattiesburg Mun. Sep. S.D. (Forest Co.)	**Free choice**	***3.1***
Issaquena-Sharkey Consol. S.D.	**Court order (free choice)**	***4.5***
Jackson Mun. Sep. S.D.	**Court order (free choice)**	[14]
McComb Mun. Sep. S.D.	**Free choice**	***1.29***
North Panola Consol. S.D.	**Free choice**	***1.8***
Okalona Mun. Sep. S.D.	**Free choice**	***.78***
South Panola Consol. S.D.	**Free choice**	***29***
MISSOURI		
Sedalia Public Schools (Pettis Co.)	[15]	
NORTH CAROLINA		
Bertie Co.	**Free choice**	***6.68***
Edgecombe Co.	**Free choice**	***1.4***
Tarboro City	**Free choice**	***5.4***
OKLAHOMA		
Idabel S.D. (McCurtain Co.)	**Free choice**	***4.4***
Stillwater No. *16* (Payne Co.)	**Free choice**	**Completely desegregated (No more all-Negro schools in system)**

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[14] The superintendent has refused to divulge information either to EEOP or to Commission staff.

[15] EEOP accepted a 441 assurance from the Sedalia Public Schools but now has requested a 441–B. Because Sedalia is not receiving funds from the Office of Education, no further steps have been taken.

SOUTH CAROLINA

School District	*Type of Plan*	*Percentage of Student Desegregation*
Barnwell No. *29* (Williston)	**Free choice**	*1.6*
Charleston No. *20* (Charleston)	**Court order (free choice)**	*3.35*
Clarendon S.D. No. *3*	**Free choice**	*1.27*
Dorchester Co. No. *1*	**Free choice**	[16]
McCormick Co.	**Free choice**	*.6*
Richland No. *1* (Columbia)	**Free choice**	*9.1*
Williamsburg Co.	**Free choice**	*1.1*

TENNESSEE

Haywood Co.	**Free choice**	*1.15*
Lauderdale Co.	**Free choice**	*2.96*

TEXAS

Calvert Ind. S.D. (Robertson Co.)	**Free choice**	*0*
Jefferson Ind. S.D. (Marion Co.)	**Free choice**	*2.01*

VIRGINIA

Caroline Co.	**Free choice**	*4.2*
Surry Co.	**Court order**	[17]

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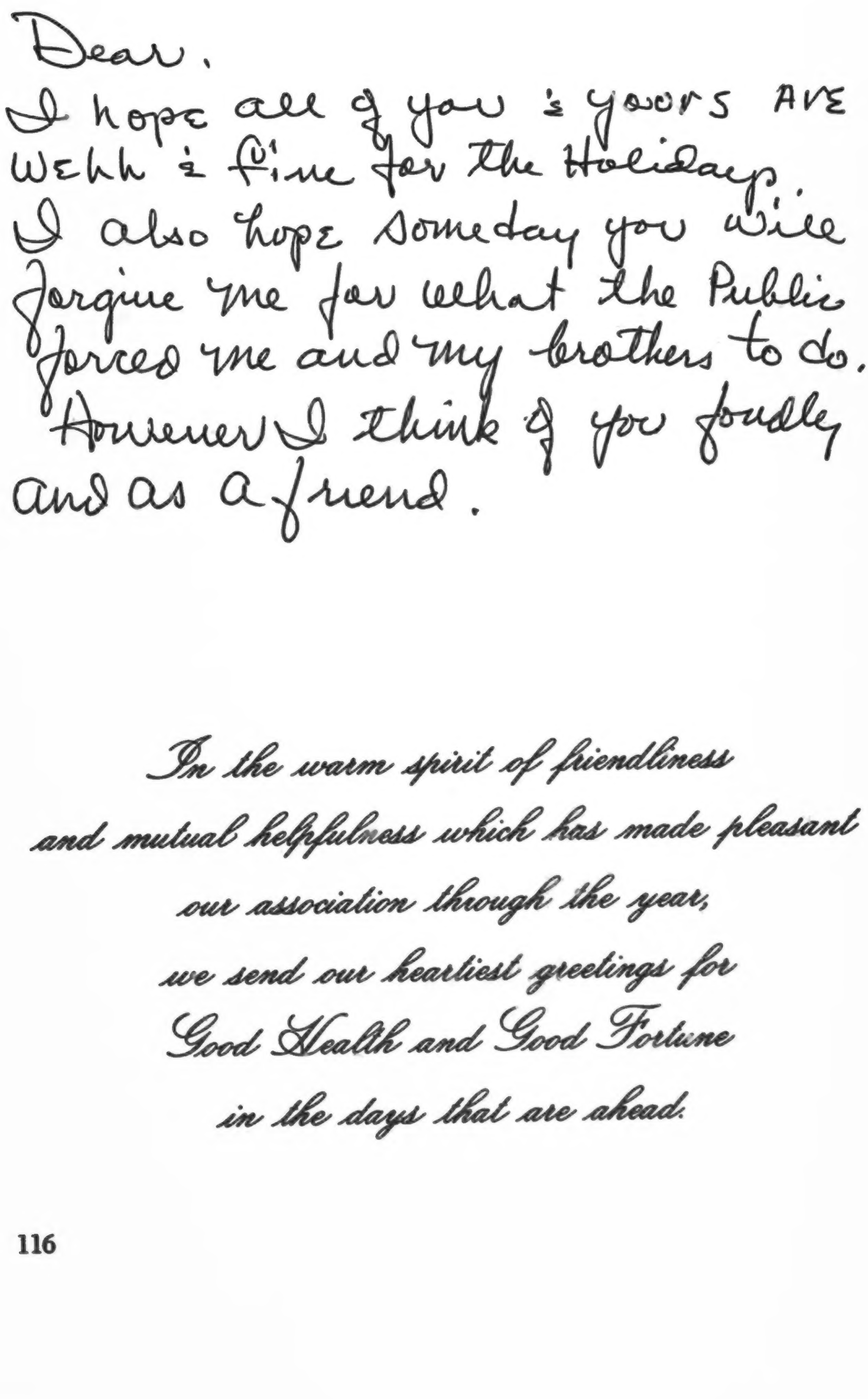
[16] There were 140 Negro students who began the school year in formerly all-white schools, but an undetermined number had dropped out at the time the Commission staff interviewed the superintendent.

[17] No white students were in the public school system.

APPENDIX IV

CLAYTON YOU AND YOURS SISTER ARE GOING TO GET THE HELL BEAT OUT OF YOU AND YOURS SISTER UNLESS YOU AND YOU SISTER STOP COMMING TO SCHOOL . Go to your on Negere schools.........

APPENDIX V



Dear,
I hope all of you & yours ARE
WELL & fine for the Holiday.
I also hope someday you will
forgive me for what the Public
forced me and my brothers to do.
However I think of you fondly
and as a friend.

In the warm spirit of friendliness
and mutual helpfulness which has made pleasant
our association through the year,
we send our heartiest greetings for
Good Health and Good Fortune
in the days that are ahead.

APPENDIX VI

SIGNIFICANT DEVELOPMENTS IN THE LAW OF SCHOOL DESEGREGATION

1. *The Jefferson County Case*

During the closing days of 1966, the Court of Appeals for the Fifth Circuit, which has appellate jurisdiction of the District Courts of Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas, handed down an opinion endorsing and adopting in substance the requirements set forth in the 1966 guidelines of the Office of Education.[1] In so doing, the court specifically found that the standards of the guidelines are constitutionally required and that the Office of Education did not exceed its authority in promulgating the various provisions of the guidelines, including, specifically, the percentage desegregation provisions applicable to free choice plans (Section 181.54).[2]

In the course of its opinion, the court specifically rejected the notion that *Brown* v. *Board of Education* [3] and the Constitution do not require integration, but only an end to enforced segregation. Concluding that "integration" and "desegregation" mean one and the same thing under *Brown*, the court used the terms interchangeably to mean achievement of a "unitary, nonracial [school] system." [4] The duty imposed by *Brown* and the Constitution, said the court, is "an absolute duty to integrate," [5] to take "affirmative action to reorganize school systems by integrating the students, faculties, facilities, and activities," wherever the effects of *de jure* segregation persist.[6] While stating that the duty to undo the effects of

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[1] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir., March 29, 1967.

[2] *Id.* at 848, 886–88.

[3] 347 U.S. 483 (1954); 349 U.S. 294 (1955).

[4] *United States* v. *Jefferson County Board of Education*, *supra* note 1, at 846 n.5, 894.

[5] *Id.* at 846 n.5.

[6] *Id.* at 862.

de jure segregation does not require that "each and every child shall attend a racially balanced school,"[7] or that there be a "maximum of racial mixing,"[8] the court nonetheless concluded that the Constitution requires "substantial integration" of the races.[9] The court explained:

> The central vice in a formerly de jure segregated public school system is apartheid by dual zoning: in the past by law, the use of one set of attendance zones for white children and another for Negro children, and the compulsory initial assignment of a Negro to a Negro school in his zone. Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes.[10]

The court held that the test for *any* plan of school desegregation is whether the plan achieves the "substantial integration" which is constitutionally required. If the plan does not accomplish this result, then it must be abandoned and a more effective plan adopted.[11]

The court noted a number of obstacles to desegregation under freedom of choice plans, observing that "only Negroes of exceptional initiative and fortitude" select white schools, and that free choice plans do not desegregate the Negro schools.[12] Nevertheless, the court did not hold that freedom of choice plans were unconstitutional *per se*. Rather, the court promulgated a decree, "to apply uniformly throughout this circuit in cases involving plans based on free choice of schools", unless "exceptional circumstances compel modification," which set forth requirements binding on school systems.[13] The decree, as subsequently modified by the court sitting *en banc*,[14] generally adopted the requirements of the guidelines for freedom of choice plans. In addition, the decree contained the following provisions:

Equalization of Schools

"[P]rompt steps" must be taken "to provide physical facilities, equipment, courses of instruction, and instructional materials," in schools previously maintained for Negro students, which are "of quality equal" to that provided in schools previously maintained for white students. If "for any reason" this is "not feasible," then such school "shall be closed as soon as possible." [15]

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[7] *Id.* at 846 n.5.
[8] *Ibid.*
[9] *Id.* at 846 n.5., 894.
[10] *Id.* at 867.
[11] *Id.* at 895–96.
[12] *Id.* at 889.
[13] *Id.* at 894.
[14] *United States* v. *Jefferson County Board of Education, supra* note 1.

Remedial Programs

"[R]emedial education programs which permit students attending or who have previously attended all-Negro schools to overcome past inadequacies in their education" [16] are required.

New Construction

"[T]o the extent consistent with the proper operation of the school system as a whole", where the school district "locate[s] any new school . . . [or] substantially expand[s] any existing schools," it must do so "with the objective of eradicating the vestiges of the dual systems." [17]

Faculty and Staff

"Teachers, principals, and staff members shall be assigned to schools so that the faculty and staff is not composed exclusively of members of one race. Wherever possible, teachers shall be assigned so that more than one teacher of the minority race (white or Negro) shall be on a desegregated faculty." [18]

The court declared that in cases where "earlier court-approved plans . . . fall short of the terms of the decree . . . [on] motion by proper parties to re-open these cases, we expect these plans to be modified to conform with our decree." [19]

The decree contemplates continuing judicial evaluation of the performance of school boards. The court stated: "If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan [footnote omitted], or some other acceptable substitute, perhaps aided by an educational park" [20] In a subsequent case, however, the Fifth Circuit placed the burden of establishing that the freedom of choice plan will not accomplish its objective upon the Negro litigant or others litigating in his behalf:

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[15] *Id.* at Section VI (a) of the decree.

[16] *Id.* at Section VI (b) of the decree.

[17] *Id.* at Sec. VII of the decree.

[18] *Id.* at Sec. VIII of the decree.

[19] 372 F.2d at 895. Thus, the decree is not to supplant existing plans of school desegregation which provide for as much or a greater degree of progress.

[20] *Id.* at 895-96.

> Until the district court after a hearing, is convinced that the freedom of choice plan will not accomplish its objective in the particular school system where that plan is being used, no question arises as to whether the court should require the school authorities to shift to a plan based on geographic attendance zones.[21]

The Tenth Circuit also has indicated that school systems previously segregated by law must affirmatively disestablish such segregation. In *Dowell* v. *School Board of Oklahoma City Public Schools,*[22] on plaintiff's motion, the district court had appointed an independent panel of experts to examine the effects of Oklahoma City's plan for desegregation of the school system. The experts found that the special transfer provisions of the plan provided an "effective loophole" for white school children.[23] The panel's recommendations included, *inter alia,* a geographic zoning system with a "majority-to-minority" transfer provision, attacked by appellants as compelling integration rather than prohibiting racial discrimination. Although a rule permitting a student to transfer only from a school in which his race is in the majority to a school where his race will be in the minority is not a racially neutral rule, but is designed to promote, and has the effect of promoting integration, nevertheless the district court approved the panel's findings and ordered the Board of Education to amend its plan accordingly. The Tenth Circuit affirmed. In its opinion, the Court pointed out that for eight years previous to the lower court decision a "minority-to-majority" plan had been in effect, a patently invalid system:

> In view of the long wait the Negro students in Oklahoma City have been forced to endure, after their rights had been judicially established, we think that requiring the new transfer plan was within the court's power to eliminate racial segregation.[24]

This parallels the language in the *Jefferson County* decision outlining the school board's duty to undo the segregation established under the *de jure* system.

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[21] *Steele* v. *Board of Public Instruction of Leon County, Florida,* 371 F.2d 395, 397 (5th Cir. 1967).

[22] 244 F. Supp. 971 (W.D. Okla. 1965), *aff'd* 375 F.2d 158 (1967), *cert. denied,* 387 U.S. 931 (1967).

[23] 375 F.2d 158, 164.

[24] *Id.* at 168.

2. Decisions Inconsistent With Jefferson County

Other circuits have reached conclusions which appear to be contrary to the holding in *Jefferson County* that the constitutionally required remedy for *de jure* school segregation is "substantial integration" of the races in the schools.

Two weeks before the *Jefferson County* decision, the Court of Appeals for the Eighth Circuit,[25] affirming approval by a district court in Little Rock of a freedom of choice desegregation plan, handed down an opinion which appears to hold that a formerly *de jure* segregated school district fully discharges its obligation under *Brown* if "all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board," even if the result is still a racially segregated school system.[26]

The school district's long history of resistance to school desegregation [27] had been cited by the plaintiffs as one reason why the freedom of choice plan should not be approved.[28] In defining the constitutional obligations of the school district, the opinion of the court preserves a tacit verbal distinction between "positive integration of the races," which is not constitutionally required,[29] on the one hand, and on the other, the constitutionally required "non-racially operated school system." [30] This distinction appears to rest on the premise that "[i]f all of the students are, in fact, given a free and unhindered choice of schools . . . it cannot be said that the state is segregating the races." [31]

The Eighth Circuit does not expressly pose the question which was to carry the Fifth Circuit to a contrary position in *Jefferson County*, to wit: *Where racial segregation in a school system is the product of unconstitutional acts or policies,* does the school district then have an affirmative duty to "undo" the segregation it has created, by bringing about substantial integration of the races? This question was answered "yes" by the Fifth Circuit. A "no" answer, however, seems implicit in the Eighth Circuit's opinion.

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[25] The Court of Appeals for the Eighth Circuit has appellate jurisdiction of the District Courts of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

[26] *Clark* v. *Board of Education of Little Rock School District*, 369 F.2d 661 (8th Cir. 1966). The opinion indicates that during the 1965–66 school year, the first year in which the freedom of choice plan operated, 621 of 7,341 Negro students in the Little Rock school system actually attended formerly all-white schools, and that the figure rose to 1,360 in the 1966-67 school year. *Id.* at 666, 667.

[27] *Id.* at 664, 666.

[28] *Id.* at 665.

[29] *Id.* at 666.

[30] *Id.* at 671.

[31] *Id.* at 666.

In the Little Rock case the freedom of choice plan approved on appeal provided for mandatory free choice only in three grades—one, seven, and 10. Under the plan, all students entering other grades were given the right to apply for transfers, which were to be "honored as a matter of course, absent problems of overcrowding."[32] The plaintiffs objected that by extending the mandatory "freedom of choice" procedure to three grades only, the plan fell below the constitutional standard. In support of this claim they pointed to the requirement in the Office of Education guidelines that every student be required to choose.[33] But the court rejected this contention, declaring:

> . . . [W]e do not believe a "freedom of choice" plan to be constitutional must *require* the student to make an annual choice. To be constitutional we have held that the plan must only afford the student the *right* to make an annual choice, and should he fail to exercise that right the student's assignment of school must be based upon criteria other than race. *Kemp* v. *Beasley, supra* [352 F.2d 14 (8th Cir. 1965).] The Constitution imposes no duty upon the students to exercise an annual choice. We believe they are protected from discrimination as long as they have the absolute right to choose and are adequately informed of this right. . . . (emphasis in original).[34]

Immediately following the decision in *Jefferson County* the appellant in the Little Rock case petitioned for a rehearing. The petition was denied,[35] but not before the court felt constrained to distinguish the Fifth Circuit opinion:

> Notwithstanding the H.E.W. guidelines and the recent opinion of the Fifth Circuit, when a student is given a well-publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action.[36]

The court was impressed by the progress which already had been made in Little Rock. Recognizing that the Fifth Circuit and the Eighth Circuit had similar goals in mind, the court stated that "[t]he breadth and depth of the segregation problem varies in different states and in different parts of the same state. . . . As problems vary in different parts of the country, of necessity the court orders to effectuate a common goal will also be varied."[37]

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[32] *Id.* at 667.
[33] *Id.* at 667–68.
[34] *Id.* at 668.
[35] *Clark* v. *Board of Education of Little Rock School District*, 374 F.2d 569 (1967).
[36] *Id.* at 571.

The need for a less drastic remedy in the Eighth Circuit prompted the court to take a "wait and see" attitude:

> We feel the plan should be given an opportunity to work . . . If the freedom of choice plan does not work, the District Court and this Court will have to discard such plan as unsuitable in providing the constitutional guarantee that should be universally accorded all students.[38]

Thus the court continually reiterated that its approval of the board's plan was a "provisional approval," depending upon future compliance. The court concluded, however, that "if in fact all the students wishing to transfer were fully accommodated, the Constitution would unquestionably be satisfied."[39]

An opinion of the Fourth Circuit, handed down a little more than a month earlier than the original Eighth Circuit opinion in *Little Rock*, although dealing with geographic zoning, parallels that opinion in distinguishing between "desegregation" and "integration". In *Swann* v. *Charlotte-Mecklenburg Board of Education,*[40] pupil attendance at all schools of the defendant school district was determined on the basis of nonracial geographic zones. The court found that these zones were fairly drawn with no motive to further segregation of the races. Stating that "the principal complaint of the plaintiffs appears to be that the zoning of the schools has not produced a greater mixture of the races than it has,"[41] the court held that the school board nonetheless had fulfilled its constitutional obligations.

In a recent decision, a majority of the Fourth Circuit, sitting *en banc*, re-affirmed its view that:

> If each pupil, each year, attends the school of his choice, the Constitution does not require that he be deprived of his choice unless its exercise is not free.[42]

Judge Sobeloff, in a concurring opinion joined by Judge Winter, took issue with this view, observing that "[o]urs is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs [*v. *Elliott]* dictum."[43] He argued that the *Briggs* v. *Elliott* dictum is inconsistent with the principle recognized by the majority opinion that " 'it is the duty of the school boards to eliminate the discrimination which inheres' in a system of segregated schools where the 'initial assignments are both involuntary and dictated by racial criteria.' "[44] Judge Sobeloff concluded: "We should move out from under the incubus of the *Briggs* v. *Elliott* dictum and take our stand beside the Fifth and the Eighth Circuits."[45]

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[37] *Id.*

[38] *Id.* at 571–72.

[39] *Id.* at 572.

[40] 369 F.2d 29 (4th Cir. 1966). The Fourth Circuit is comprised of Maryland, West Virginia, Virginia, North Carolina, and South Carolina.

[41] *Id.* at 32.

[42] *Bowman* v. *County School Board,* C.A. No. 10,793, 4th Cir., June 12, 1967, (slip opinion at 3).

3. Lee v. Macon County Board of Education

In *Lee* v. *Macon County Board of Education*[46] a three-judge panel handed down an opinion, and a decree applying throughout the State of Alabama, which enjoins State officials from furthering discrimination in the schools of the State and requires "affirmative action to disestablish all state enforced or encouraged public school segregation", in the manner set forth in detail in the decree.[47]

An initial order of desegregation applicable to the Macon County Schools had issued in this case in August 1963. The court on several occasions thereafter issued injunctions against interference with the orderly desegregation of Macon County schools by various Alabama State officials. The most comprehensive order, issued in July 1964, enjoined the Governor of Alabama and other officials of the State Board of Education, from implementing State tuition-grant legislation so as to subsidize the attendance of children at white-only schools, and from failing to exercise control and supervision over the schools of the State "in such a manner as to promote and encourage the elimination of racial discrimination in the public schools. . . ."[48]

In the months of August 1966, through November 1966, the

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[43] *Id.* at 19. In *Briggs*, Judge Parker stated that "The Constitution . . . does not require integration . . . it merely forbids discrimination." 132 F. Supp. 776, 777 (E.D. S.C. 1955).

[44] *Id.* at 16–17.

[45] *Id.* at 20. Judge Sobeloff cited *Kemp* v. *Beasley*, 352 F.2d 14, 21 (8th Cir. 1965) in which the Eighth Circuit had said: "The dictum in Briggs has not been followed or adopted by this Circuit and it is logically inconsistent with Brown and subsequent decisional law on this subject."

[46] 267 F. Supp. 458 (M.D. Ala. 1967).

[47] *Id.* at 480.

[48] *Id.* at 461.

United States, and other plaintiffs in the action, filed supplemental complaints, attacking the constitutionality of a new State tuition-grant statute, enacted by Alabama after the court's July 1964 order, requesting an injunction against the use of State funds to support the dual school system, and asking for a statewide school desegregation order.

The court found that in the 2½ years following its July 1964 order the "relentless opposition" of the defendant officials to school desegregation had continued.[49] These State officials, the court found, had used their power essentially in two ways:

> First, they have used their authority as a threat and as a means of punishment to prevent local school officials from fulfilling their constitutional obligation to desegregate schools, and, second, they have performed their own functions in such a way as to maintain and preserve the racial characteristics of the system.[50]

The court found that the defendant State officials actively had sought to discourage local school officials from cooperating with the Office of Education, and had continued to exercise "extensive control over school construction and consolidation in such a manner as to perpetuate a dual public school system . . .",[51] to thwart "efforts toward implementation of the constitutional requirement to eliminate faculty and staff segregation in the public school system of Alabama",[52] to finance and permit the operation of segregated school bus systems, and to operate its trade schools, vocational schools and State colleges on a segregated basis.

Turning to the tuition-grant statute, the court found that "when viewed in the context of the facts and circumstances which gave rise to its enactment . . . it is but another attempt of the State of Alabama to circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes".[53] Thus, the court found that it made no difference that the tuition statute made eligibility for a tuition grant turn on the parent's judgment that the child's attendance at public school would be detrimental to the child's "physical and emotional health".[54] The court noted that "every [tuition-grant] dollar paid during the 1965–66 school year went to students enrolled in all-white private schools established when the public schools desegregated."[55]

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[49] *Id.* at 464–65.
[50] *Id.* at 466.
[51] *Id.* at 471.
[52] *Id.* at 473.
[53] *Id.* at 476.
[54] *Id.* at 477.
[55] *Ibid.*

Taking note of the persistent reenactment by the State Legislature of such tuition grant legislation, the court observed that "the Governor has officially encouraged private contributions to support the many private schools throughout the State *as alternative to the public desegregated school system* [footnote omitted]." (Emphasis in original).[56] The court noted that its own response thus far had been to use its injunctive powers "to prevent the State of Alabama from establishing a separate school system for white children," [57] but then went on to give this warning:

> It must be made perfectly clear, however, that if the state persists in its efforts dedicated to this end, and its involvement with the private school system continues to be "significant," [footnote omitted] then this "private" system shall have become a state actor within the meaning of the Fourteenth amendment and will need to be brought under this Court's state-wide desegregation order.[58]

The court's decree requires the State superintendent of education to pass upon all proposals for the construction or expansion of school facilities and to withhold approval:

> . . . if judged in light of the capacity of existing facilities, the residence of the students, and the alternative sites available, the construction will not, to the extent consistent with the proper operation of the school system as a whole, further the disestablishment of state enforced or encouraged public school segregation and eliminate the effects of past state enforced or encouraged racial discrimination in the State's public school system.[59]

The decree further requires the 99 named school systems in Alabama not subject to a court order of desegregation to be informed by the State superintendent of education that they must comply with the specific desegregation requirements set forth in the decree. These desegregation requirements embody a "freedom of choice" desegregation plan corresponding substantially with provisions of the 1966 guidelines and with the decree in the *Jefferson County* case. The court stated that "[i]f the [freedom of choice] plan does not work" then there would arise "a constitutional obligation to find some other method to insure that the dual school system . . . is eliminated." [60] The decree adds specific additional requirements with regard to faculty desegregation and desegregation of school transportation.

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[56] *Ibid.*
[57] *Id.* at 478.
[58] *Ibid.*
[59] *Id.* at 481.
[60] *Id.* at 480.

4. *Comparison of Court Orders and Guidelines Provisions*

In 1966, there continued to be wide variety in the requirements imposed by district courts passing upon school desegregation plans in litigation. Some courts issued decrees which substantially paralleled the requirements of the guidelines.[61] Other courts entered orders imposing requirements which fell far short of the standards of the guidelines.

For example, in four school desegregation cases [62] in the Western District of Louisiana, Chief Judge Dawkins approved, in August 1966, school desegregation plans providing, for the 1966–67 school year, a five-day period during which students in the seven "desegregated" grades could "apply in person, accompanied by parent or guardian," [63] for transfer to another school. The order provided that such transfer applications "shall not be unreasonably denied," but that the transfers "will be made in accordance with procedures pertaining to transfers currently in general use" in the school district.[64] The order listed eight "criteria to be applied in granting or denying the request for transfer or assignment."[65] These factors included the "[a]vailability of space and other facilities in the school to which the transfer . . . is requested," and the "age of the pupil as compared with the ages of pupils already attending the school to which transfer is requested."[66] The order further provided that:

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[61] *Lee* v. *Macon County Board of Education*, 253 F. Supp. 727 (M.D. Ala. 1966) (per curiam) (Rives, Grooms, Johnson, J.J.) (decided March 11, 1966); *Carr* v. *Montgomery County Board of Education*, 253 F. Supp. 306 (M.D. Ala. 1966) (Johnson, J.) (decided March 22, 1966); *Harris* v. *Bullock County Board of Education*, 253 F. Supp. 276 (M.D. Ala. 1966) (Johnson, J.) (decided March 11, 1966). See also *Miller* v. *School District Number 2, Clarendon Co.*, 256 F. Supp. 370 (D.S.C. 1966) (decided June 14, 1966); *Thompson* v. *County School Board of Hanover County*, 252 F. Supp. 546 (E.D. Va. 1966; *Wright* v. *County School Board of Greensville County*, 252 F. Supp. 378 (E.D.Va. 1966). In the two last-named cases, decided by Judge Butzner on Jan. 27, 1966, school desegregation plans which had been approved by the Office of Education were held inadequate to meet constitutional requirements in several respects; in both cases Judge Butzner found the staff desegregation provisions too limited.

Orders requiring desegregation plans essentially adopting the Office of Education guidelines were handed down in seven cases in the Eastern District of South Carolina on Aug. 25, 1966: *Adams* v. *Orangeburg School Board*, C.A. No. 8301; *Brown* v. *Charleston School District No. 20*, C.A. No. 7747; *Brunson* v. *Board of Trustees of School District No. 1 of Clarendon County*, C.A. No. 7210; *Randall* v. *Sumter School District No. 2*, C.A. No. AC-1240; *Stanley* v. *Darlington County School District*, C.A. No. 7749; *Whittenberg* v. *Greenville County School District*, C.A. No. 4396; *Miller* v. *School District No. 2, Clarendon County*, *supra.*

[62] *Newton* v. *Ouachita Parish School Board*, 11 Race Rel. L. Rep. 1208 (1966); *United States* v. *Bienville Parish School Board*, 11 Race Rel. L. Rep. 1211 (1966); *United States* v. *Lincoln Parish School Board*, 11 Race Rel. L. Rep. 1212 (1966); *United States* v. *Richland Parish School Board*, 11 Race Rel. L. Rep. 1213 (1966). All four orders followed termination of federal assistance by the United States Office of Education for failure to comply with Title VI requirements. Three of the four districts (all but Ouachita Parish) were reinstated for federal assistance pursuant to the Office of Education policy of accepting a court order in lieu of an agreement to comply with the guidelines.

[63] 11 Race Rel. L. Rep. 1210, 1212, 1213, 1214.

[64] *Ibid.*

> In the event a transfer . . . is requested to a particular school, but it develops that there is available space in another school, in all respects comparable to the one to which transfer or assignment is requested, closer to the applicant's residence, the School Board may, if it deems it advisable, make the assignment to the comparable school closest to the pupil's residence. . . .[67]

The order further provided that for the following school year, 1967–68, all "initial assignments" were to be made through a free choice plan, but that the transfer provisions, outlined above, would continue in effect.[68] In an earlier order the court had specified that in the desegregation plans to be submitted by the school boards in each of these four cases, "[t]he question of desegregation of teaching and administrative personnel . . . will be deferred until the plan for desegregation of pupils, as finally approved, either has been accomplished or has made substantial progress."[69]

On April 1, 1966, Judge Scarlett, District Judge for the Southern District of Georgia, decreed that the defendant school authorities, while "enjoined from maintaining in the operation of the . . . School System any distinctions based upon race or color," are also "enjoined and required to maintain and enforce distinctions based upon age, mental qualifications, intelligence, achievement and other aptitudes upon a uniformly administered program."[70] The accompanying opinion cites at length[71] factual material to show that schools would seriously suffer "if school children are integrated *en masse* on a common plane and are not classified in accordance with their intelligence and educability,"[72] and that such "unfortunate consequences [to the schools] occur in direct proportion to the number of Negroes enrolled."[73] The order provided that the "defendants shall . . . abolish every rule or policy under which colored applicants for school teacher positions or colored school teachers are accorded preference over white applicants or teachers as a result of race and color." [74] All questions relating to the integration of teaching staffs were deferred for a further hearing and order after this provision (among others) had been put into effect.[75]

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[65] *Ibid.*

[66] *Ibid.*

[67] *Ibid.*

[68] *Id.* at 1211, 1212, 1213, 1214.

[69] 11 Race Rel. L. Rep. 1209, 1211, 1212, 1213.

[70] *Stell* v. *Savannah-Chatham County Board of Education*, 255 F. Supp. 88, 99 (S.D. Ga. 1966).

[71] *Id.* at 94–98.

[72] *Id.* at 98.

[73] *Id.* at 96.

In addition to falling short of the standards set by the guidelines, most districts under court order in the Fifth Circuit lagged behind standards set by the Court of Appeals. For example, on July 23, 1964, the Court of Appeals for the Fifth Circuit had declared that one requirement which school desegregation plans must meet is that where overcrowding would result from the granting of a particular choice of school, priority is to be given on the basis of proximity of residence to the school.[76] As of April 1966, some 73 out of the 99 court-approved freedom of choice plans in the Fifth Circuit failed to meet this requirement.[77]

5. Discrimination Against Negro Teachers

In 1966, there were several significant cases involving discrimination against Negro teachers.

In *Smith* v. *Board of Education of Morrilton School District No. 32*,[78] the entire all-Negro teaching staff of a Negro school was dismissed when the school was closed because its students had chosen to go elsewhere under a free choice plan of desegregation. The teachers, suing through a professional organization, argued that their dismissal was unconstitutional, and the court agreed.

The court acknowledged that the sequence of the school closing, and the dismissal of the teaching staff of the closed school, was "consistent with the action taken by the board in connection with 11 other school consolidations, and consequent closings, in the past" unrelated to school desegregation.[79] But the court held:

> [W]e feel that the Board's consolidation policy may not be applied where, as here, a school is closed as the direct consequence of an effort to rectify constitutional defects in the method by which pupils and teachers have previously been assigned, where the effect

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[74] *Id.* at 99.

[75] *Ibid.*

[76] *Stell* v. *Savannah-Chatham County Board of Education*, 333 F.2d 55, 65 (5th Cir.), *cert. denied*, 379 U.S. 933 (1964).

[77] Brief for United States, App. Vol I, Part C. *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir., March 29, 1967 (drawn from plan summaries presented therein).

[78] 365 F.2d 770 (8th Cir. 1966) (decided Sept. 14, 1966).

[79] *Id.* at 778.

> is to impose, without some concern for qualifications to teach, the heavy burden of unemployment solely upon those whose constitutional rights were violated, and where an additional result may be to impede meaningful realization of the constitutional rights of others, that is, the pupils.[80]

The court thereupon ordered the board to ascertain whether the plaintiffs still were interested in employment by the school district, and directed that any teacher "who manifests such interest shall be offered the first position for which he is . . . qualified in which a vacancy now exists or hereafter occurs." [81] The court also held that the teachers were entitled to be recompensed for damages sustained by reason of the wrongful dismissal.

In another teacher dismissal case, arising in the Fourth Circuit, *Chambers* v. *Hendersonville City Board of Education,*[82] a formerly all-Negro school had been closed. The Negro enrollment in the school district dropped from 498 to 281 because, in conjunction with the closing, 217 Negro students who had attended school in the district, though residing outside it, by court order were integrated into their respective county schools. Only eight of the 24 teachers who had taught at the Negro school were retained, although 14 new white teachers were brought into the system. Upholding the contention of the teacher-plaintiffs that their dismissal was improper, the court stated:

> Patent upon the face of this record is the erroneous premise that when the 217 Negro pupils departed and the all-Negro consolidated school was abolished, the Negro teachers lost their jobs and that they, therefore, stood in the position of new applicants. . . . White teachers who met the minimum standards and desired to retain their jobs were not required to stand comparison with new applicants or with other teachers in the system. Consequently the Negro teachers who desired to remain should not have been put to such a test.[83]

Therefore, the court held that:

> All of the plaintiffs who desire to teach in the Hendersonville School system and who can meet the minimum standards of the Board are entitled to an order requiring their re-employment for the 1966-67 school year [footnote omitted] and an award of any damages which may have been incurred.[84]

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[80] *Id.* at 780.

[81] *Id.* at 784. See also *Franklin* v. *County School Board of Giles County,* 360 F.2d 325 (4th Cir. 1966) (decided April 6, 1966), where 7 Negro teacher plaintiffs had been dismissed after the closing of two Negro schools. The court held that "plaintiffs are entitled to re-employment in any vacancy which occurs for which they are qualified by certificate or experience." 360 F.2d at 327. Recently, the *Chambers* and *Franklin* decisions were found to be controlling in *Wall* v. *Stanly County Board of Education,* Civ. No. 11,019, 4th Cir. *en banc,* May 19, 1967.

[82] 364 F.2d 189 (4th Cir. 1966) (decided June 6, 1966).

[83] *Id.* at 192.

[84] *Id.* at 193.

6. Desegregation of Faculties

Another Fourth Circuit case, *Wheeler* v. *Durham City Board of Education,*[85] involved the issue of discriminatory teacher assignment. The Fourth Circuit, sitting *en banc,* ruled that "removal of race considerations from faculty selection and allocation is, *as a matter of law,* an inseparable and indispensable command within the abolition of pupil segregation in public schools as pronounced in *Brown*. . . ." (Emphasis added.)[86] The court therefore held that the plaintiffs, all of whom were pupils or parents, rather than teachers, did not have to prove any "relationship between faculty allocation and pupil assignment . . . [t]he only factual issue is whether or not race was a factor entering into the employment and placement of teachers." The court found that in the pending case race had been a factor in faculty allocation, though it declined to "require any involuntary assignment or reassignment of a teacher" who was not a party to the suit.[87]

In the first Little Rock case, discussed above, the court called for "accelerated and positive action to end discriminatory practices in staff assignment and recruitment." The school board was required to make "all additional positive commitments necessary to bring about some measure of racial balance in the staffs of the individual schools in the very near future." [88] The court stated that "the age old distinction of white schools and Negro schools must be erased. The continuation of such distinctions only perpetuates inequality of educational opportunity and places in jeopardy the effective operation of the entire 'freedom of choice' type plan." [89] The court required the board to include in its plan a "positive program" to abolish teacher segregation.

Other courts in recent decisions have attempted to define what constitutes faculty desegregation, and some have laid down specific time limits for achieving it.

In *Robinson* v. *Shelby County Board of Education,*[90] the school board was required in January 1967 to adopt a number of specified procedures with respect to filling teaching vacancies, recruiting, reassigning teachers, and reporting to the court, in order to "desegregate faculty of each school." The court defined faculty desegregation:

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[85] 363 F.2d 738 (4th Cir. 1966) (decided July 5, 1966).

[86] *Id.* at 740.

[87] *Id.* at 740–41.

[88] *Clark* v. *Board of Education of Little Rock School District,* 369 F.2d 661, 669 (8th Cir. 1966).

[89] *Ibid.*

[90] C.A. No. 4916, W.D. Tenn., Jan. 19, 1967.

> The faculty of a school will be considered desegregated when the ratio of white teachers to Negro teachers in the school is the same, with reasonable leeway of approximately ten percent (10%), as the ratio of white teachers to Negro teachers in the whole number of certified personnel in the Shelby County Public School System.[91]

In *Kier* v. *County School Board of Augusta County, Virginia,*[92] a district court imposed a similar requirement on a Virginia school board but included a time requirement:

> Teachers and administrative staff members directly serving the students shall be integrated for the 1966-67 school term and thereafter, and the defendants shall endeavor to equate the percentage of Negro teachers and administrative staff members in each school in the system with the percentage of Negro teachers and administrative staff members in the entire Augusta County School system for the 1966-67 school term.[93]

The Court of Appeals for the Tenth Circuit in *Dowell, supra,* approved on January 23, 1967, a district court order which required the racial composition of the faculty of each school to reflect within 10 percent that of the district's whole teaching staff by 1970.[94]

A recent case decided by the United States District Court for the District of Columbia cited the *Kier* and *Dowell* cases favorably in decreeing mandatory reassignment of teachers. The court, concerned with removing the last remnants of *de jure* segregation in the District's school system, said:

> It is clear, first, that an injunction should be directed against every possibility of willful segregation in the teacher assignment process; if the preferences of principals and teachers are to be relied on at all by the assistant superintendent or any other officer making the assignment, measures must be taken to insure that race does not creep into the expression of preference.
>
> Next, assignment of incoming teachers must proceed on a color-conscious basis to insure substantial and rapid teacher integration in every school. And finally, to the extent that these two measures are unable quickly to achieve sufficient faculty integration in the schools, this court . . . has no doubt that a substantial reassignment of the present teachers, including tenured staff, will be mandatory.[95]

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[91] *Id.* at 3.

[92] 249 F. Supp. 239 (W.D. Va., 1966).

[93] 11 Race Rel. L. Rep. 227, 236 (1966).

[94] *Board of Education of Oklahoma City Public Schools* v. *Dowell* 375 F.2d 158 *cert. denied,* 387 U.S. 931 (1967).

[95] *Hobson* v. *Hansen,* 269 F. Supp. 401, 506 (D.D.C. 1967).

Citing the *Dowell* and *Kier* decisions which require mathematical proportionment of Negro and white teachers equally in every school, the court noted that "there is a great appeal in the simplicity and thoroughness of such a decree." [96]

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[96] *Ibid.*

APPENDIX VII

THE AUTHORITY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE TO REQUIRE EACH VOLUNTARY PLAN SCHOOL DISTRICT TO ACHIEVE SUBSTANTIAL DESEGREGATION THROUGHOUT THE SCHOOL SYSTEM AS A CONDITION OF RECEIVING FEDERAL FUNDS.

To disestablish segregation which has been compelled by law, a school board must adopt a pupil assignment system which will achieve substantial *actual* integration. Several decisions of the United States Court of Appeals for the Fifth Circuit support this proposition. In *Singleton* v. *Jackson Municipal Separate School District*,[1] the court said:

> In retrospect, the second Brown opinion clearly imposes on public school authorities the duty to provide an integrated school system. Judge Parker's well-known dictum ("the Constitution . . . does not require integration. It merely forbids discrimination.") in *Briggs* v. *Elliott* . . . should be laid to rest. It is inconsistent with Brown and later developments of decisional and statutory law in the area of civil rights.

In a subsequent opinion in the same case, the court reiterated that "[s]chool authorities . . . are under the constitutional compulsion of furnishing a single, integrated school system." [2]

Subsequently, in *Davis* v. *Board of School Commissioners of Mobile County*,[3] the Fifth Circuit found that a desegregation plan of the Mobile, Alabama, School Board fell short of the Constitution in several respects. "Principal among these is the fact that even as to those grades which, under the plan, have actually become 'desegregated' there is *no true substance* in the alleged desegregation. Less than two-tenths of one percent of the Negro children in the system are attending white schools." (Emphasis added.)[4]

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[1] 348 F.2d 729, 730 n.5 (5th Cir. 1965).

[2] *Singleton* v. *Jackson Municipal Separate School District*, 355 F.2d 865, 869 (5th Cir. 1966).

[3] 364 F.2d 896 (5th Cir. 1966).

In a more recent decision, *United States* v. *Jefferson County Board of Education,*[5] a panel of the Fifth Circuit held that the Constitution requires school districts which formerly maintained dual systems to take affirmative action to reorganize their schools into a unitary, nonracial system in such a way as to eradicate the effects of the past discrimination. The court said:

> Adequate redress therefore calls for much more than allowing a few Negro children to attend formerly white schools; it calls for liquidation of the State system of de jure school segregation and the organized undoing of the effects of the past segregation.[6]

Although the court determined that freedom of choice plans were at present one of the acceptable means for school districts to fulfill their affirmative responsibilities, the court stressed that the only constitutionally acceptable desegregation plan was one that produced substantial integration:

> *The only school desegregation plan that meets constitutional standards is one that works.* (Emphasis in original.)[7]
>
> * * *
>
> As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the result—the performance. Has the operation of the promised plan actually eliminated segregated and token-desegregated schools and achieved substantial integration? [8]

On rehearing before all the judges of the Fifth Circuit the full court, composed of 12 judges, adopted, with clarifications, the opinion of the three-judge panel, stressing that its acceptance of freedom of choice was qualified and that the ultimate test lay in the results.

The court held that school officials in States which compelled segregation by law are under an affirmative duty to bring about an integrated unitary school system "in which there are no Negro schools and no white schools—just schools."[9] In holding that the 14th amendment lays down an affirmative duty upon school boards and officials to "bring about an integrated, unitary school system," the full court expressly overruled prior cases within the circuit which approved the *Briggs* dictum.[10]

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[4] *Id.* at 901.

[5] 372 F.2d 836 (5th Cir. 1966), *aff'd on rehearing en banc,* C.A. No. 23345, 5th Cir., March 29, 1967.

[6] *Id.* at 866.

[7] *Id.* at 847.

[8] *Id.* at 894.

Several judges of the Fourth Circuit have expressed similar views. In *Bradley* v. *School Board of the City of Richmond,*[11] Judges Sobeloff and Bell, concurring in part and dissenting in part, stated:

> . . . the initiative in achieving desegregation of the public schools must come from the school authorities . . . Affirmative action means more than telling those who have long been deprived of freedom of educational opportunity, 'You now have a choice' . . . It is now 1965 and high time for the court to insist that good faith compliance requires administrators of schools to proceed actively with *their* nontransferable duty to undo the segregation which both by action and inaction has been persistently perpetuated. (Emphasis in original.)[12]

Although most of the recent cases stressing that desegregation plans must "work" and get "objective" results have involved school systems desegregating under freedom of choice, the language and rationale of the opinions extend to desegregation plans of all kinds. In other cases, moreover, the courts have held or indicated that the "results" test applies to plans other than those based on free choice. In *Dowell* v. *School Board of Oklahoma City Public Schools,* for example, the court required a degree of actual integration under a geographic zoning plan. In *Dowell,* the school district, in response to the *Brown* decision, ended assignment and transfer policies based solely on race and adopted unitary attendance zones following neighborhood lines. The court held that such a policy resulted in continued unconstitutional school segregation:

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[9] Opinion on rehearing *en banc,* C.A. No. 23345, 5th Cir., March 29, 1967 (slip opinion at 5). This principle was early laid down in *Northcross* v. *Board of Education of the City of Memphis, Tennessee,* 302 F.2d 818, 822 (6th Cir. 1962) *cert. denied* 370 U.S. 944 (1963). Other courts reiterated it, often in the context of requiring faculty desegregation. See, *e.g., Brown* v. *County School Board of Frederick County, Virginia,* 245 F. Supp. 549, 560 (W.D.Va. 1965); *Kier* v. *County School Board of Augusta County, Virginia,* 249 F. Supp. 239, 246 (W.D.Va. 1966); *Bradley* v. *School Board of City of Richmond, Virginia,* 345 F.2d 310, 324 (4th Cir. 1965) (opinion concurring in part and dissenting in part), *vacated and remanded for evidentiary hearings on impact of faculty segregation on adequacy of school desegregation plan,* 382 U.S. 103 (1965).

[10] *United States* v. *Jefferson County Board of Education, supra,* note 9 (slip opinion at 5). *See also Kemp* v. *Beasley,* 352 F.2d 14, 21 (8th Cir. 1965), in which the Eighth Circuit rejected the *Briggs* dictum, stating that "it is logically inconsistent with *Brown* and subsequent decisional law on the subject."

[11] 345 F.2d 310, 322–23 (4th Cir. 1965), *vacated and remanded,* see note 9 *supra,* 382 U.S. 103(1965).

[12] See also *Hobson* v. *Hansen,* 269 F. Supp. 401, 494–95 (D.D.C. 1967). In *Bowman* v. *County School Board,* C.A. No. 10,793, 4th Cir., June 12, 1967, Judge Sobeloff, in a concurring opinion joined by Judge Winter, observed that "[o]urs is the only circuit dealing with school segregation resulting from past legal compulsion that still adheres to the *Briggs* [v. *Elliott*] dictum." Slip opinion, p. 19.

> This result follows because: (a) Negro pupils residing in all Negro areas are locked into Negro schools which traditionally have served such areas. The existence of such schools and neighborhoods is neither accidental nor fortuitous, but the result of laws requiring segregation in housing and education. . .[13] To draw school zone lines without regard to these residential patterns is to continue the very segregation which necessitated the rezoning action, and requires judicial condemnation of the procedure.[14]

The Sixth Circuit also has noted that, because of established housing patterns, even fairly drawn geographic attendance zones may often result in little actual integration of the schools and therefore must be rejected for failure to disestablish the dual school system.[15]

Substantial integration of a school system requires desegregation of Negro schools as well as white schools. As the three-judge panel of the Fifth Circuit said in *Jefferson County*:

> Dual zoning persists in the continuing operation of Negro schools identified as Negro, historically and because the faculty and students are Negroes. Acceptance of an individual's application for transfer, therefore, may satisfy that particular individual; it will not satisfy the class. The class is all Negro children in a school district attending by definition inherently unequal schools and wearing the badge of slavery separation displays. Relief to the class requires school boards to desegregate the school from which a transferee comes as well as the school to which he goes.[16]

Recently, in *Hobson* v. *Hansen,* [17] Federal Court of Appeals Judge J. Skelly Wright handed down a decision involving the District of Columbia schools in which he pointed out two additional considerations which could be thought to underlie a judicial remedy to compel a "degree of actual integration" in a formerly *de jure* school system even where the school system adopts a unitary geographic zoning system of pupil assignment.

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[13] 244 F. Supp. 971, 976, *aff'd in part,* 375 F.2d 158 (10th Cir.) *cert. denied,* 387 U.S. 931 (1967).

[14] *Id.* at 980. In the *Jefferson County* opinion, Judge Wisdom found that the operation of the dual school system itself is in part responsible for residential segregation (372 F.2d at 876):

> Here school boards, utilizing the dual zoning system, assigned Negro teachers to Negro schools and selected Negro neighborhoods as suitable areas in which to locate Negro schools. Of course the concentration of Negroes increased in the neighborhood of the school. Cause and effect came together.

[15] *Northcross* v. *Board of Education of City of Memphis,* 333 F.2d 661 (6th Cir. 1964).

[16] 372 F.2d at 867–68.

[17] 269 F. Supp. 401 (D.D.C. 1967).

> One, the court is entitled to real assurance that the school board has abandoned its earlier unconstitutional policy of segregation, assurance which only the objective fact of actual integration can adequately provide, inasmuch as only that is "clearly inconsistent with a continuing policy of compulsory racial segregation." Gibson v. Board of Public Instruction, 5 Cir., 72 F.2d 763, 766 (1959). Two, the entire community, white and black, whose own attitude toward Negro schools is what stigmatizes those schools as inferior, must be disabused of any assumption that the schools are still officially segregated, an assumption it might cling to if after supposed "desegregation" the schools remained segregated in fact.[18]

The court compared the NLRB's remedy of permanently "disestablishing" company-dominated unions.[19]

Nothing in the Civil Rights Act of 1964 precludes the Department of Health, Education, and Welfare from requiring substantial desegregation throughout the school system in States in which school segregation has been compelled by law.

Title IV of the Civil Rights Act of 1964 authorizes the Commissioner of Education to render technical assistance in the preparation, adoption, and implementation of plans for the desegregation of public schools upon the request of local school officials.[20] The Commissioner also is authorized to make grants for in-service training of teachers to deal with, or for employment of specialists to advise on, problems incident to desegregation.[21] The word "desegregation" is defined in section 401 to mean "the assignment of students to public schools and within such schools without regard to their race, color, religion or national origin, but . . . shall not mean the assignment of students to public schools in order to overcome racial imbalance." [22]

Section 401(b) merely defines the term "desegregation" as it appears in the section of Title IV authorizing technical and financial assistance to desegregating school districts. Another section in Title IV,[23] however, which authorizes the Attorney General to bring school desegregation suits when certain conditions are satisfied, disclaims intent to authorize Federal officials to require racial balance by the transportation of pupils, at least until it is clear that racial imbalance is unconstitutional. Section 407(a)[24] provides that "... nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance or otherwise enlarge the existing power of the court to insure compliance with constitutional standards." The reference to "any official" as well as "any court", arguably indicates that in using the term "nothing herein", Congress meant "nothing in this act" (including Title VI), rather than "nothing in Title IV".[25]

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[18] *Id.* at 494–95.

[19] *Carpenter Steel Co.* 76 N.L.R.B. 670 (1948). See Freund, *Civil Rights and the Limits of Law*, 14 Buffalo L. Rev. 199, 205 (1964).

[20] 78 Stat. 247, 42 U.S.C. 2000-c (1964).

[21] 78 Stat. 247, 42 U.S.C. 2000c-4 (1964).

[22] 78 Stat. 246, 42 U.S.C. 2000c(b) (1964).

[23] 78 Stat. 248, 42 U.S.C. 2000c-6 (1964).

Neither Section 401(b) nor Section 407(a), however, was intended to limit the power of the Department of Health, Education, and Welfare or the Attorney General to effectuate desegregation in districts which formerly maintained a *de jure* dual school system. After analyzing the legislative history, the Fifth Circuit so concluded in the *Jefferson County* case in upholding the percentage student desegregation provisions of the guidelines:

> It is clear however from the hearings and debates that Congress equated the term [racial imbalance], as do the commentators, with 'de facto segregation' that is, non-racially motivated segregation in a school system based on a single neighborhood school for all children in a definable area (footnote omitted).[26]

The legislative history supports the conclusion of the Fifth Circuit. Section 401(b) was introduced on the floor by Representative William C. Cramer as an amendment to Title IV of the bill. No other Representative commented upon his amendment, which was accepted, without vote, by the sponsor of the Title, Representative Emanuel Celler. Representative Cramer's remarks show that he was concerned that the bill in its original form might authorize the government to require busing to eliminate *de facto* segregation. He stated of his amendment:

> The purpose is to prevent any semblance of congressional acceptance or approval of the concept of "de facto" segregation or to include in the definition of "desegregation" any balancing of school attendance by moving students across school district lines to level off percentages where one race outweighs another.[27]

Five days earlier, Mr. Cramer had offered a newspaper account of a decision involving *de facto* segregation in Manhasset, Long Island, into the record and said, even less equivocally, "*De facto* segregation is racial imbalance." [28]

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[24] 78 Stat. 248, 42 U.S.C. 2000-6(a) (1964).

[25] See the statement of then Senator Hubert H. Humphrey in debate, 110 Cong. Rec. 12715 (1964); discussion in *United States* v. *Jefferson County School Board*, 372 F.2d at 880–82.

[26] *Id.* at 878.

[27] 110 Cong. Rec. 2280 (1964).

Section 407(a) was introduced as part of an amendment in the nature of a substitute bill agreed upon by a bipartisan leadership group. The then Senator Hubert H. Humphrey, floor manager of the bill in the Senate, explained that the purpose of the "anti-busing" proviso was to prevent the bill being taken as an extension of the powers of the Federal Government to eliminate segregation other than that condemned in ***Brown***:

> This addition seeks simply to preclude an inference that the title confers new authority to deal with "racial imbalance" in schools, and should serve to soothe fears that Title IV might be read to empower the Federal Government to order the bussing of children around a city in order to achieve a certain racial balance or mix in schools. . . . Thus, classification along bona fide neighborhood school lines, or for any other legitimate reason which local school boards might see fit to adopt, would not be affected by Title IV, so long as such classification was bona fide. Furthermore, this amendment makes clear that the only Federal intervention in local schools will be for the purpose of preventing denial of equal protection of the laws.[29]

In response to a request for assurances that desegregation required by Title VI would not entail busing of students to relieve "racial imbalance," Senator Humphrey made it clear that the language of section 407(a) referred to *de facto* segregation by citing a decision holding that the 14th amendment does not require disestablishment of *de facto* school segregation:

> That language [excluding racial imbalance from coverage of the bill] is to be found in Title IV. . . . This provision merely quotes the substance of a recent court decision which I have with me, and which I desire to include in the Record today, the so-called Gary case. . . . Judge Beamer's opinion in the Gary case is significant in this connection. In discussing this case, as we did many times, it was decided to write the thrust of the court's opinion into the proposed substitute.[30]

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[28] 110 Cong. Rec. 1598 (1964).

[29] 110 Cong. Rec. 12714 (1964).

[30] 110 Cong. Rec. 12715 (1964). The Court of Appeals for the Seventh Circuit in *Bell* v. *School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), adopted the finding of the district court that: "An examination of the school boundary lines in the light of the various factors involved such as density of population, distances that the students have to travel and the safety of the children, particularly in the lower grades, indicates that the areas have been reasonably arrived at and that the lines have not been drawn for the purpose of including or excluding children of certain races." 324 F.2d at 213. Based upon this evidence, the court held that "there is no affirmative U.S. Constitutional duty to change innocently arrived at school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either Negro or white pupils." *Ibid.*

It is clear from this legislative history, and especially from the floor manager's reliance on the *Bell* decision, that Congress did not intend to equate corrective acts to eliminate the effects of a State-enforced dual school system, such as Negro schools established as a result of gerrymandering school boundary lines to exclude white students and locating schools on a racial basis, etc., with acts designed to bring about racial balance in districts where the racial separation is not a direct effect of the past maintenance of a dual school system.[31]

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[31] Cf. *Dowell* v. *School Board of Oklahoma City Public Schools*, 244 F. Supp. 971, 980–81, *aff'd in part*, 375 F.2d 158 (10th Cir.) *cert. denied*, 387 U.S. 931 (1967).

APPENDIX VIII

STAFF PAPER

LEGAL IMPLICATIONS OF FEDERAL TAX BENEFITS TO RACIALLY SEGREGATED PRIVATE SCHOOLS

This paper is in four parts. The first part explores the question whether allowing private schools which exclude Negro students exemption from Federal income tax and allowing persons and organizations making contributions to such schools to deduct such contributions from their gross income (1) violates Title VI of the Civil Rights Act of 1964, which proscribes discrimination "under any program or activity receiving Federal financial assistance", or (2) contravenes the standards imposed by the Code itself as conditions for eligibility to receive such tax benefits. If the answer to either question is "yes", the Internal Revenue Service, which administers the Code provisions, is under a duty to deny to such schools the tax benefits generally accorded private educational institutions.

The second part discusses the question whether the Internal Revenue Service may constitutionally provide such benefits to racially segregated private schools. The third part deals with the question whether racially segregated private schools receiving Federal tax benefits are under a constitutional duty to desegregate. The fourth part examines bases for distinguishing tax-exempt social clubs and professional organizations and discusses the question whether, assuming IRS is under a duty to withhold tax benefits from racially segregated private schools, it necessarily follows that such tax benefits, when accorded to religious schools and other church-oriented institutions, amount to an "establishment of religion" in violation of the First Amendment to the United States Constitution.

PART I

Title VI and the Internal Revenue Code

According to information obtained by the Department of Justice and the Department of Health, Education, and Welfare, at least 200 private schools for white students only have been established in the South, most of them in response to the desegregation of public schools.[1] The result may be another form of school segregation, with whites in private schools and only Negroes in public schools, no less disadvantageous and damaging than that condemned by the Supreme Court in *Brown* v. *Board of Education.* Judge Wisdom of the United States Court of Appeals for the Fifth Circuit recently declared:

> Private schools, aided by state grants, have mushroomed in some states in this circuit. The flight of white children to these new schools and to established private and parochial schools promotes resegregation.[2]

Under the Internal Revenue Code, privately owned and operated educational institutions generally are granted considerable financial benefits and encouragement. Among other benefits, their income is exempt from taxation and both corporate and private contributions to their operations are, within limits, deductible as charitable contributions from the contributor's gross income.[3] Seventeen private schools in the South have been approved by IRS for the enjoyment of Federal tax benefits. As of March 2, 1967, approximately 40 new private schools in the South had applications pending with IRS.[4]

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[1] See *supra* pp. 114–18.

[2] *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 848–49 (5th Cir. 1966) (dictum), *aff'd on rehearing en banc*, C.A. No. 23345, 5th Cir. March 29, 1967.

Other educational institutions established before the *Brown* decision, in both the South and the North, exclude Negro students according to the terms of racially restricted charitable trusts under which they were established. See, for example, the most recent Girard College litigation, *Commonwealth of Pennsylvania* v. *Brown*, 260 F. Supp. 323, 358 (E.D. Pa. 1966), *vacated in part and remanded*, 373 F.2d 771, (3rd Cir. 1967); *Sweet Briar Institute* v. *McClenny*, 10 Race Rel. L. Rep. 1005 (Amherst Co., Va., Cir. Ct., 1965); *Sweet Briar Institute* v. *Button*, 11 Race Rel. L. Rep. 1176 (W.D.Va. 1966), *vacated*, 12 Race Rel. L. Rep. 85 (W.D. Va. 1966), *rev'd per curiam*, 387 U.S. 423 (1967); *Moore* v. *City and County of Denver*, 133 Colo. 190, 292 P.2d 986 (1956).

[3] Internal Revenue Code of 1954, § 170(a)-(c) (contributions to educational organizations deductible from gross income); § 501(c)(3) (the exemption of educational institutions and charities from income tax); § 642(c) ("unlimited" charitable contribution deduction from income of estates and trusts); § 2055(a) (charitable bequest deductible from taxable estate); § 2522 (charitable contributions deductible from amount of taxable gifts). For a recent analysis of the benefits to taxpayers and charitable organizations which these sections provide, see Lewis, *Income Realization and Charitable Contributions: The Economics of Altruism*, 54 Georgetown L.J. 482 (1966).

[4] Information supplied by Internal Revenue Service, March 2, 1967.

A. Section 601 of Title VI of the Civil Rights Act of 1964 provides, in broad and inclusive language, that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.[5]

Section 602[6] authorizes Federal agencies empowered to extend Federal financial assistance to any program or activity to promulgate regulations implementing section 601. Compliance with such regulations may be enforced by the termination of or refusal to grant or continue assistance to any recipient under such a program or activity upon a finding on the record, after a hearing, of failure to comply with the regulations.

In enacting Title VI, Congress was implementing its power to set the conditions upon which the Federal Government would extend Federal financial assistance. This power extends to Federal grants which are made to private individuals and organizations, as well as to public agencies. Asked by Senator Cooper whether the term "recipient" in Section 602 applied to private individuals, the Attorney General responded:

> "Recipient" means generally the person or entity to whom a Federal grant or loan is made, or with whom a Federal assistance contract is entered into. . . . A private person or organization may also be the recipient of a Federal grant or loan, as in the case of a Hill-Burton grant to a hospital.[7]

Tax benefits are a form of Federal financial assistance. As an Assistant Chief Counsel of the Internal Revenue Service has written of tax exemption:

> Where the object of an exemption, which is income, is of a character which is subject to tax, the effect is to save the beneficiaries of the exemption from tax at the expense of persons who are taxed. From the standpoint of the people and their principles of government, such inequality is not equity in taxation. Moreover, it differs only in method from a disbursement of government funds.[8]

By allowing an exemption from the payment of income tax, the Federal Government subsidizes the exempt institution by allowing it to keep revenues which would otherwise be paid to the Government.

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[5] 78 Stat. 252, 42 U.S.C. 2000d (1964).

[6] 78 Stat. 252, 42 U.S.C. 2000d-1 (1964).

[7] 110 Cong. Rec. 10076 (1964).

[8] Reiling, *Federal Taxation: What Is A Charitable Organization?* 44 A.B.A.L.J. 525 (1958).

Tax deductibility for contributions also constitutes a Federal subsidy to the benefited charities. A single taxpayer with no dependents, for example, is taxed on each dollar of taxable income over $22,000 at a 50 percent rate. By allowing the taxpayer to deduct a contribution of one dollar from his taxable income, the Government, in effect, gives to the charity the fifty cents which it would otherwise have received as taxes. Since the highest tax rate is 70 percent, up to 70 percent of the funds contributed to a benefited charity may thus be money which would have been paid as taxes had the Internal Revenue Service not allowed the deduction.

During December of 1966, Commission staff attorneys visited Lowndes County, Alabama, where a racially segregated private school had opened in September of that year. In 1966, the school received $100,000 in tax-deductible donations and began building permanent facilities. As a result of the opening of the private school, white attendance at the nearest formerly all-white public high school dropped from 178 students during 1965–66 to three students in the fall of 1966, when the first Negro students enrolled there. The benefits given racially segregated private schools by the grant of Federal tax benefits are extensive, and contribute to the growth and development of such schools. Contributions to these schools lessen the tax burdens of individual taxpayers, allow the schools to continue in operation, and diminish Federal revenues.

The view that granting tax-exempt status constitutes a form of governmental financial assistance has received judicial recognition in cases involving the 14th amendment "State action" doctrine. The question in *Evans* v. *Newton*[9] was whether a park operated under a charitable trust containing a racial restriction was subject to a constitutional duty to desegregate if transferred from municipal to private control. The Supreme Court held that the grant of a State property-tax exemption of the kind generally accorded charitable trusts was one of several elements of "municipal maintenance and concern" which, taken together, subjected the facility to "the restraints of the Fourteenth amendment." [10]

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[9] 382 U.S. 296 (1966). See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961); *Eaton* v. *Grubbs*, 329 F.2d 713 (4th Cir. 1964) (*en banc*); *Commonwealth of Pennsylvania* v. *Brown*, 260 F.Supp. 323 (E.D. Pa. 1966), *rev'd on other grounds*, 373 F.2d 711 (3rd Cir. 1967). These cases are discussed *infra* pp. 250–51. *But compare* the opinion of Judge Skelly Wright in *Guillory* v. *Adm'rs of Tulane University*, 203 F. Supp. 855 (E.D. La. 1962), *order issued vacating summary judgment, dissolving injunction, and ordering cause to proceed to trial on the merits*, 207 F. Supp. 554 (E.D. La. 1962), *order aff'd*, 306 F.2d 489 (5th Cir. 1962), *with* the decision of Judge Ellis after trial on the merits, 212 F. Supp. 674 (E.D.La. 1962). In the latter opinion, though the court held that Tulane, a private university, was not supported by the State to an extent great enough to be invested with a public character and so subject to the restraints of the Fourteenth amendment, Judge Ellis did indicate that a greater degree of support by the State might have that effect, and that tax exemptions are simply one form of granting State funds, although not sufficient to constitute "state action" in the case at bar.

Tax deductibility for contributions has also been considered by the Supreme Court to be a form of governmental financial assistance. In *Griffin* v. *County School Board of Prince Edward County,*[11] the county supervisors closed the public schools of the county to avoid public school desegregation and passed two county ordinances, authorized by State law, providing for tuition grants to parents of children attending the private school, for white children only, located in the county, and authorizing a credit against real estate and personal property taxes for contributions to the school. In passing upon the constitutionality of these two provisions, the district court considered both to be governmental financial assistance:

> County tax funds have been appropriated (in the guise of tuition grants and tax credits) to aid segregated schooling in Prince Edward County.[12]

The district court enjoined the county officials from allowing further tuition grants or tax credits to subsidize the segregated private school so long as the public schools remained closed. The United States Supreme Court affirmed the District Court's judgment. Mr. Justice Black, writing for the Court, held that the Prince Edward County plan was

> created to accomplish . . . the perpetuation of racial segregation by closing white schools and operating only segregated schools supported directly or indirectly by state or county funds. . . . Accordingly, we agree with the District Court that closing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.[13]

Under the terms of section 602, Title VI applies to Federal financial assistance to any program or activity "by way of grant, loan, or contract other than a contract of insurance or guaranty".

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[10] 382 U.S. at 301.

[11] 377 U.S. 218 (1964).

[12] *Allen* v. *County School Board of Prince Edward County,* 198 F. Supp. 497, 503 (E.D. Va. 1961), *vacated sub nom. Griffin* v. *Board of Supervisors of Prince Edward County,* 322 F.2d 332 (4th Cir. 1963), *rev'd sub nom. Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964).

[13] 377 U.S. at 232.

There is nothing in the legislative history of Title VI to indicate that in using the term "grant", Congress intended to limit its scope to direct grants of money from the Federal Government. On the contrary, an examination of the legislative history supports the view that Congress intended the term "grant" to have broad coverage. For example, Representative Celler, Chairman of the House Judiciary Committee and one of the chief spokesmen for Title VI in Congress, gave the following explanation of the Title on the floor of the House:

> In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money *and other kinds of financial aid.* It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination. (Emphasis added.)[14]

In their regulations implementing Title VI, Federal agencies have construed the term "grant" to apply broadly to both direct and indirect forms of aid. The regulations governing Coast Guard programs adopted by the Secretary of the Treasury and approved by the President explicitly cover many indirect forms of aid:

> The term "Federal financial assistance" includes (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.[15]

Under the Internal Revenue Code, the United States gains an interest in "all income from whatever source derived."[16] No item may be deducted from gross income unless specific authorization for its deduction is given by Congress. Deductions from gross income depend "upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." [17] By assistance in section 602 is the express exclusion of "a contract of allowing deductions for contributions to segregated schools, Congress gives or bestows money over which it has control and authority. Thus, it may well be said that through the operation of the Internal Revenue Code, under which segregated private schools qualify for tax benefits, the Internal Revenue Service bestows upon them a "grant" of Federal financial assistance.[18]

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[14] 110 Cong. Rec. 2467 (1964).

[15] "Nondiscrimination in Federally-Assisted Programs of the United States Coast Guard—Effectuation of Title VI of the Civil Rights Act of 1964". 33 C.F.R. 24, 55(d).
An identical definition is contained in the original Regulation issued by the Department of Health, Education, and Welfare upon which the Treasury Department regulation was based, 45 C.F.R. Part 80.

[16] Int. Rev. Code of 1954, 61(a) (definition of "gross income").

The only exception to the broad concept of Federal financial insurance or guaranty." [19] Under the principle *expressio unius est exclusio alterius*, the legal presumption must be that Congress did not intend to exclude any other forms of Federal financial assistance from the operation of the statute and, absent a clear contrary intention on the part of Congress, the exceptions may not be widened by implication.[20]

B. The Internal Revenue Code allows tax benefits to bodies "organized and operated exclusively for . . . educational purposes," [21] but provides little guidance as to what this means apart from specifying that the net earnings of such bodies may not inure to the benefit of private individuals and that no substantial part of the activities of exempt organizations may include carrying on propaganda, influencing legislation, or participating in political campaigns.[22] Interpreters of this provision, therefore, are compelled to look into the legislative history of the Code, the decisional law and regulations construing provisions granting tax benefits, and authoritative commentaries and articles. These sources indicate that the granting of tax benefits to educational institutions is conditioned upon a general public benefit requirement.

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[17] *Deputy* v. *Dupont*, 308 U.S. 488, 493 (1940). Accord, *Interstate Transit Lines* v. *Commissioner*, 319 U.S. 590, 593 (1943); *Friedman* v. *Delaney*, 171 F.2d 269, 270 (1st Cir. 1948), *cert. denied*, 366 U.S. 936 (1949).

[18] Cf. discussion of the meaning of the term "grant", as used in sec. 4 of the Hatch Act, 5 U.S.C. 118k, in *Palmer* v. *United States Civil Service Commission*, 191 F. Supp. 495, 537–8 (S.D.Ill. 1961).

[19] 78 Stat. 252, 42 U.S.C. 2000d-4 (1964).

[20] See *Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607 (1944); *Brooks* v. *St. Louis-San Francisco Ry. Co.*, 180 F.2d 185, 187 (8th Cir. 1950), *cert. denied*, 339 U.S. 966 (1950).

[21] Int. Rev. Code of 1954, §§ 170(c)(2)(B) and 501(c)(3).

[22] *Id.* §§ 170(c)(2)(C)-(D) and 501(c)(3). The latter section, which grants exemptions from payment of income tax and which forms the basis of the provision allowing deductibility for charitable contributions, provides exemptions for:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propoganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

As explained in a report of the House Ways and Means Committee:

> The Government is compensated for the loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds, and by benefits resulting from promotion of the general welfare.[23]

In a similar formulation, an Assistant Chief Counsel of the Internal Revenue Service has stated that "an exemption of the organization, if properly made, ought to rest upon the ground that the organization performs essential services, the burden of which otherwise would fall upon the government." [24] Rephrasing this idea, he stated:

> Or put it this way: institutions devoted to and operated for such purposes are public institutions devoted to public purposes. As such, they meet this test for exemption.[25]

This general public welfare requirement has been recognized in rulings of the Commissioner of Internal Revenue and in court decisions. Thus, before determining that a foundation which awarded scholarships solely to undergraduate members of a designated fraternity was entitled to a tax exemption, the Commissioner had to decide whether the purposes of the foundation were

> so personal, private, or selfish in nature as to lack the elements of public usefulness and benefit which are required of organizations qualifying for exemption under section 501(c)(3) of the Code.[26]

The requirement of a general public benefit also arises out of the rule that educational institutions, to receive tax benefits, must be classed as "charitable" in the generally accepted legal sense of the term.[27]

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[23] House Report No. 1860, 75th Cong., 3rd Sess. 19 (1938).

[24] Reiling, *supra* note 8, at 595.

[25] *Ibid.*

[26] Rev. Rul. 56–403, C.B. 1956–2, p. 307.

[27] See Treas. Reg. §§ 1.501(c)(3)-1 (d)(2). It has often been held that a body formed for educational purposes is not entitled to tax benefits unless its purposes and organization are exclusively charitable. *E.g., Seasongood* v. *Commissioner*, 227 F.2d 907 (6th Cir. 1955); *Horace Heidt Foundation* v. *United States*, 170 F. Supp. 634 (Ct. Claims 1959); *Amy Hutchison Crellin*. 46 B.T.A. 1152 (1942).

The Board of Tax Appeals—predecessor to the United States Tax Court—defined the term "charity" as follows:

> "Charity is generally defined as a gift for public use. Such is its legal meaning." . . . *Kain* v. *Gibboney,* 101 U.S. 362. . . . "A charity is a gift to a general public use, which extends to the rich, as well as to the poor." . . . *Perin* v. *Carey,* 24 How. 465.[28]

Granting tax-exempt status and tax deductibility for contributions to racially segregated private schools may be viewed as incompatible with the general public benefit requirement. Racially segregated private schools are so contrary to the public interest that the net result would appear to be public harm rather than public benefit:

> Classification by race is altogether different in psychological origin and effect from other methods classifying beneficiaries. It is designed to hurt, not to benefit, and sociologists tell us that such is its effect. The malevolence of racial selection is the antithesis of charity, and therein might be found the basis for a legal distinction.[29]

The arguments made by one legal commentator for the nonenforceability of racially restricted charitable trusts seem equally applicable here:

> But beyond mere inefficiency, segregation is psychologically harmful and morally wrong in contemporary society. There is general agreement among psychologists and sociologists that nonsynthesis of racial, ethnic, and national groups is harmful to society. Thus it is not difficult to say that generally the societal benefit is less in the case of a racially segregated charity. . . . When the group excluded is an economically weak racial or ethnic minority, an effect will be the perpetuation of the economic and social disparity between such excluded group and society as a whole. In assessing the benefit to one group, one cannot ignore the resultant detriment to another. Though a social good may come from the segregated charitable activity, we may argue that an overriding policy causes it to be unenforceable as it stands.[30]

It is particularly incongruous to grant Federal tax benefits to a racially segregated private school where the school has been formed to obstruct or frustrate a Federal constitutional and statutory policy requiring desegregation of the public school system.[31] The failure to deny Federal tax benefits to such a school subsidizes the effort to circumvent the Federal policy. It is an established tenet of the law of charities that an institution formed for a purpose contrary to public policy must be classed as non-charitable.[32]

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[28] *James Sprunt Benevolent Trust,* 20 B.T.A. 19, 24 (1930).

[29] Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard,* 66 Yale L.J. 979, 1001 (1957). (Footnote omitted.)

[30] Power, *The Racially Discriminatory Charitable Trust: A Suggested Treatment,* 9 St. Louis U.L.J. 478, 493–94 (1965). The Supreme Court has repudiated racial classifications as being "obviously irrelevant and invidious", *Steele* v. *Louisville & Nashville R.R. Co.,* 323 U.S. 192, 203 (1944) and "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943). See also, *Loving* v. *Virginia,* 388 U.S. 1 (1967).

Similarly, for an educational institution to confer a public benefit, "the educational purpose must not be too tightly restricted to a particular group of beneficiaries." [33] "There can be no dedication, strictly speaking, to private uses, nor even to uses public in their nature, but the enjoyment of which is restricted to a limited part of the public." [34] There is a contradiction in making a gift for a "public" use and then excluding an entire race of persons which makes up a substantial part of that public. As the Supreme Court noted in *Evans* v. *Newton*:

> It would have posed conceptual difficulties, to say the least, to

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[31] In a recent case a three-judge Federal district court found it "unmistakably clear" that in Alabama segregated private schools were promoted and financed pursuant to a state policy "born of an effort to resist and frustrate implementation of the *Brown* decision." *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458, 476 (M.D. Ala. 1967), citing *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743 (M.D. Ala. 1964). Cf. *Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218 (1964).

[32] See, *e.g.*, *Restatement (Second), Trusts* § 377 and comment *c* (1959). The Supreme Court has given great weight to clearly stated national and state policies in determining whether certain deductions should be allowed under other sections of the Code. In *Tank Truck Rentals* v. *Commissioner*, 356 U.S. 30 (1958), a tank truck rental company, which could not operate profitably without violating the maximum weight limitations imposed by several eastern States, deliberately operated overweight trucks and paid the fines assessed when the trucks were found to be in violation of state maximum weight laws. The Court refused to permit the taxpayer to deduct these fines as an ordinary and necessary business expense, holding that a deduction can not be granted "if allowance of the deduction would frustrate sharply defined national or state policies proscribing particular types of conduct, evidenced by some governmental declaration thereof." (356 U.S. at 33–34)

[33] 6 Mertens, *Law of Federal Income Taxation*, sec. 34.11, ch. 34, p. 37, (Zimet Rev. 1957). One commentator has suggested that a racial restriction also violates the general public benefit requirement because for an endeavor to be classed as charitable "the quality which distinguishes [the class of persons to be benefited] from the other members of the community . . . must be a quality which does not depend on their relationship to a particular individual." See the opinion of Lord Simonds in *Oppenheim* v. *Tobacco Securities Trust Co., Ltd.*, [1951] 1 All E.R. 31, 34, [1951] A.C. 297, 306. According to this theory, when a person establishes a school and then restricts enjoyment of its benefits to members of his own race, beneficiaries are characterized not on the basis of whether they are in need or deserving, but rather exclusively on the basis of a racial relationship which they share with each other and with the founder. The racial designation thus is analogous to a restriction of benefits to members of the donor's own family or to persons controlled, directly or indirectly, by the donor's private interests, both of which are noncharitable and deprive the otherwise charitable endeavor of Federal tax benefits. Treas, Reg. § 1.501(c)(3)—1(d)(1)(ii). See Power, *supra* note 30, at 493–94 (1965). On the non-charitable nature of the former category, see *Amy Hutchison Crellin, supra* note 27; *Henry C. Dubois*, 31 B.T.A. 239 (1934); and *James Sprunt Benevolent Trust, supra* note 28. On the latter category, see, *e.g.*, *Horace Heidt Foundation* v. *United States, supra* note 27.

[34] *Western Union Tel. Co.* v. *Georgia Ry. & Banking Co.*, 227 Fed. 276, 285 (S.D. Ga. 1915) (speaking of the dedication of an easement to public use).

> dedicate land to the public as a whole, at the same time excluding the members of the Negro race.[35]

Some courts have held racial restrictions inserted in a charitable trust by the grantor to conflict with a general charitable purpose.[36] The Georgia Supreme Court, in a case involving a private college, has concluded that under Georgia law a racial segregation requirement in a charitable trust contradicts the requirement of general public benefit upon which tax benefits were conditioned under state law.[37] The Georgia Constitution of 1945, in a provision similar in many respects to the Code sections in issue, authorized the legislature to exempt from state taxation all institutions of "purely public charity," all intangible personal property held for the benefit of educational institutions, and all buildings and property used by such "colleges, incorporated academies or other seminaries of learning as are open to the general public." At the same time, the enactment limited the granting of the exemptions to racially segregated institutions. The Georgia court held that there was "unquestionably an irreconcilable conflict between these two provisos. . . ." [38] The court resolved the conflict by excising the segregation requirement.

The racially segregated private school is not beneficial to the whole public but only to a portion of it, selected with an intent which is personal, private and selfish in nature. Although the private person is free to indulge his prejudice, it would be entirely appropriate to conclude that, under the Code as well as under Title VI, he cannot be assisted in doing so by the Government through a grant of tax benefits.

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[35] 382 U.S. 296, 300–01 n. 3.

[36] *Rice University* v. *Carr*, 9 Race Rel. L. Rep. 613 (Harris Co., Tex., Dist. Ct. 1964), *appeal dismissed sub nom. Coffee* v. *William Rice University*, 387 S.W.2d 132 (Tex. Civ. App. 1965) *dismissal of appeal reversed*, 403 S.W.2d 340 (Tex. Sup. Ct. 1966); *Re Dominion Students' Hall Trust*, [1947] Ch. 183, 116 L.J.R. 371; *Sweet Briar Institute* v. *Button*, 11 Race Rel. L. Rep. 1176 (W.D. Va. 1966), *vacated*, 12 Race Rel. L. Rep. 85 (W.D. Va. 1966), *rev'd per curiam*, 387 U.S. 423 (1967). Cf. *Smith* v. *Moore* 225 F. Supp. 434, 444 (E.D.Va. 1963), *aff'd in part*, 343 F.2d 594 (4th Cir. 1965); and *Howard Savings Institution* v. *Peep*, 34 N.J. 494, 170 A.2d 39 (1961).

This is a minority position among American courts, however. Compare: *Evans* v. *Newton*, 220 Ga. 280, 138 S.E.2d 573 (1964), *rev'd on other grounds*, 382 U.S. 296 (1966); *In re Girard College Trusteeship*, 391 Pa. 434, 138 A.2d 844, *appeal dismissed and cert. denied sub nom. Pennsylvania* v. *Board of Directors of City Trusts*, 357 U.S. 570 (1958); *Moore* v. *City and County of Denver*, 133 Colo. 190, 292 P.2d 986 (1956).

[37] *Emory University* v. *Nash*, 218 Ga. 317, 127 S.E.2d 798 (1962).

[38] *Id.* at 322, 127 S.E.2d at 801. Although this case was based upon a state tax provision which exempted institutions of "purely public charity" and not upon the Federal Internal Revenue Code which exempts institutions "organized and operated exclusively for . . . charitable . . . or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual," the two standards are sufficiently similar in rationale and function that judicial construction of the state law affords a guide to proper construction of the Code provisions.

PART II

The Constitutionality of Affording Federal Tax Benefits To Racially Segregated Private Schools

In assessing the obligation of the Internal Revenue Service under Title VI and the Code, it should be borne in mind that serious *constitutional* questions are raised by the provision of tax benefits to private schools which exclude Negroes.

A. The 14th amendment by its terms prohibits a State from denying to any person within its jurisdiction the equal protection of the laws. The Supreme Court and other Federal courts have held that the Fifth amendment's due process clause imposes upon the Federal Government an equivalent prohibition against racial discrimination.[39]

The 14th amendment not only forbids racial discrimination by a State, but also forbids States to support or participate in ostensibly private racial segregation "through any agreement, management, funds, or property." [40] Federal administrative agencies have taken the position that the Fifth amendment prohibits them not only from discriminating on the basis of race but also from sanctioning discrimination.[41] Thus, Federal as well as State financial participation in racially discriminatory educational enterprises would appear to be unconstitutional.

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[39] *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Simkins* v. *Moses H. Cone Mem. Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964); *Hobson* v. *Hansen*, 269 F.Supp. 401 (D.D.C. 1967). In *Bolling* v. *Sharpe*, the Court indicated that, with respect to racial discrimination, the reach of the due process clause of the Fifth amendment was coextensive with that of the equal protection clause of the 14th amendment. The Court said (347 U.S. at 500):

> In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government. We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth amendment to the Constitution.

Cf. Hurd v. *Hodge*, 334 U.S. 24 (1948). See also *Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), in which Mr. Justice Murphy, in a concurring opinion, stated (at 208):

> The Act [the Railway Labor Act] contains no language which directs the manner in which the bargaining representative shall perform its duties. But it cannot be assumed that Congress meant to authorize the representative to act so as to ignore rights guaranteed by the Constitution. Otherwise the Act would bear the stigma of unconstitutionality under the Fifth amendment in this respect.

[40] "State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the amendment's command that no state shall deny to any person within its jurisdiction the equal protection of the laws." *Cooper* v. *Aaron*, 358 U.S. 1, 19 (1958).

The tuition grant cases demonstrate the unconstitutionality of direct financial participation by government in segregated private education. In *Griffin* v. *County School Board of Prince Edward County*,[42] Negro school children challenged the constitutionality of Virginia legislation and county ordinances authorizing tuition grants to be made available to children attending a private school, for white students only, established in Prince Edward County. Also under challenge was a county ordinance allowing persons to credit contributions made to the school against their property taxes. Faced with a court order to desegregate the public schools, the county supervisors had refused to levy school taxes. Thus, the county's public schools were closed although public schools in every other county in Virginia remained open. The Supreme Court held that the school board could not finance, directly or indirectly, an ostensibly private school system as an alternative to a desegregated public school system. It therefore sustained the district court's injunction against the county officials barring them from paying county tuition grants or giving property tax concessions and from processing applications for State tuition grants while the public schools remained closed.[43]

In subsequent litigation, the State constitutional and statutory provisions authorizing tuition grants for attendance at "nonsectarian private schools" were held unconstitutional as applied to named racially segregated private schools.[44] Finding that the State grants constituted significant support of a number of such schools, the district court determined that:

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[41] The National Labor Relations Board has rescinded the certification as bargaining representative under the National Labor Relations Act of labor unions which have engaged in racial discrimination. Holding that it was constitutionally required to take this action, the Board stated:

> Specifically we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining representative. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1; *Hurd* v. *Hodge*, 334 U.S. 24; *Bolling* v. *Sharpe*, 347 U.S. 497.

Independent Metal Workers Union, Local No. 1, 147 N.L.R.B. 1573 (1964); See also Sovern, *Legal Restraints on Racial Discrimination in Employment* 155–60 (1966). Cf. *Local Union No. 12, United Rubber, Cork, Linoleum and Plastic Workers of America, AFL-CIO* v. *N.L.R.B.*, 368 F.2d 12 (5th Cir. 1966).

[42] 377 U.S. 218 (1964).

[43] See also *Hall* v. *St. Helena Parish School Board*, 197 F. Supp. 649 (E.D.La. 1961) (three-judge court), *aff'd per curiam*, 368 U.S. 515 (1962).

[44] *Griffin* v. *State Board of Education*, 239 F.Supp. 560 (E.D. Va. 1965).

> the State is nurturing segregated schools. Hence, the defendants must be enjoined from providing money to be funnelled by the parents into these schools so long as segregation is practiced in them.[45]

In a more recent action by Negro parents of school-age children, in which the Attorney General intervened, and which resulted in an order to desegregate all public schools in Alabama, the three-judge district court held violative of the 14th amendment an Alabama tuition grant system which made state funds available to parents of children whose attendance at public school would be detrimental to the child's "physical and emotional health".[46] In holding that the statute was "but another attempt of the State of Alabama to circumvent the principles of *Brown* by helping to promote and finance a private school system for white students not wishing to attend public schools also attended by Negroes", the court laid down a strict rule against State participation in ostensibly private segregation: "It is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." [47]

To be sure, the tax benefit provisions of the Code were not passed by Congress as part of a program of resistance to public school desegregation, as were the tuition grant and tax credit schemes in the *Prince Edward County* case and the other tuition grant cases. But the Supreme Court has held that the absence of an express government-sponsored scheme to foster private discrimination does not preclude a holding that the State is responsible for action which has the unintended effect of fostering such discrimination. In *Burton* v. *Wilmington Parking Authority*,[48] a Negro had been refused service at a privately-owned restaurant which leased its space from a municipal parking authority. Although this State-created Authority took no part in the day-to-day policies and operations of the restaurant and was solely concerned with the collection of rent, the Supreme Court found that a violation of the 14th amendment had occurred. The Parking Authority, which was an agent of the State, could have exacted a nondiscrimination pledge from the restaurant in the lease. The failure of the authority to exact such a pledge when it was in a position to do so made the State a silent partner in the discrimination:

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[45] *Id.* at 565. The court determined that the payment of tuition grants was unconstitutional "if the private school is the creature of, or is preponderantly maintained by, the grants. . . ." *Ibid.* A three-judge district court in Louisiana, however, in a case involving a challenge to the Louisiana tuition grant system, declined to follow this test in denying a motion of the defendant to dismiss the action on the ground that the plaintiffs lacked standing. Citing cases where the degree of State involvement in ostensibly private segregation was held to contravene the equal protection clause even though the involvement was less than predominant, the court held that plaintiffs had standing to challenge this involvement:

> A segregated school predominantly supported by State funds is an *a fortiori* case of unconstitutional state action. But any amount of state support to help found segregated schools or to help maintain such schools is sufficient to give standing to Negro school children to file the kind of complaint filed in this case.

Poindexter v. *Louisiana Financial Assistance Commission*, 258 F. Supp. 158, 164 (E.D. La. 1966). See also discussion and cases cited *infra.*

[46] *Lee* v. *Macon County Board of Education*, 267 F.Supp. 458, 477 (M.D. Ala. 1967).

[47] *Id.*, slip opinion at 23–24. In an earlier case involving a similar Alabama tuition grant program, the court held that "the use of the grant-in-aid statutes by the State of Alabama, through the payment of tuition grants for students enrolled in schools that discriminate upon the basis of race or color is unconstitutional." *Lee* v. *Macon County Board of Education*, 231 F. Supp. 743, 754 (M.D. Ala. 1964) (three-judge court). State tuition grants for attendance at segregated private schools were also voided as unconstitutional in *Hawkins* v. *North Carolina State Board of Education*, 11 Race Rel. L. Rep. 745 (W.D.N.C. 1966) (three-judge court); *Brown* v. *State Board of Education*, C.A. No. AC 1655, D.S.C., March 12, 1965 (temporary injunction); *Pettaway* v. *County School Board of Surry County, Virginia*, 230 F. Supp. 480 (E.D. Va. 1964), *aff'd and remanded*, 339 F.2d 486 (4th Cir. 1964); *Aaron* v. *McKinley*, 173 F. Supp. 944 (E.D. Ark. 1959), *aff'd per curiam sub nom. Faubus* v. *Aaron*, 361 U.S. 197 (1959).

> But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to a refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle [the restaurant] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth amendment.[49]

B. Indirect governmental financial support of racially segregated institutions may also violate the Constitution. Thus, tax exemptions have been viewed by courts as an element of State support which may give rise to a duty of nondiscrimination on the part of the recipient.[50]

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[48] 365 U.S. 715 (1961).

[49] *Id.* at 725. See also *Smith* v. *Holiday Inns of America, Inc.*, 336 F.2d 630 (6th Cir. 1964).

[50] In *Evans* v. *Newton*, 382 U.S. 296, 301, (1966), the Supreme Court cited the State property-tax exemption allowed a privately managed charitable trust which administered a park as one element of governmental involvement making the park "subject to the restraints of the Fourteenth amendment." The Court in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722, 724 (1961), while "sifting facts and weighing circumstances", noted the existence of a tax exemption for the revenue bonds and property of the Authority as one of the "activities, obligations, and responsibilities" of the State involving it in ostensibly private discrimination. A tax exemption granted to a privately managed hospital facility was held to "attain significance" as an element of State action and involvement "when viewed in combination with other attendant State involvement." *Eaton* v. *Grubbs*, 329 F.2d 710, 713 (4th Cir. 1964). Cf. *Greisman* v. *Newcomb Hospital*, 40 N.J. 389, 192 A.2d 817 (1963), in which tax-exempt status was held to be the basis for applying due process limitations to a private hospital accused of arbitrarily denying staff membership.

Income tax exemption aids only activities which result in profit. Commonly, the schools, hospitals, and charities qualifying for the benefit do not show net profits and hence often are not affected by tax exemption. Granting tax-deductible status to contributions made by donors to racially segregated activities or institutions, however, amounts to a far more serious involvement of Government because tax-deductible treatment of charitable donations aids the beneficiary of the donation regardless of whether it shows a profit. As noted earlier, a tax deduction for contributions to qualifying institutions amounts to a Federal contribution to the qualifying institution.[51] A deductible donation to a racially segregated school, therefore, compels a contribution by the Government to that school. Thus the Federal Government, as the Supreme Court said in *Burton*, can be said to have "elected to place its power, prestige, and property behind the admitted discrimination" and can be deemed a "joint participant" in the segregation.[52]

PART III

The Constitutional Duty of Private Schools Receiving Federal Tax Benefits Not To Exclude Negroes

The foregoing discussion has dealt with the constitutional duty of IRS to refrain from giving tax benefits to racially segregated private schools. A corollary issue is whether, so long as they receive such benefits, racially segregated private schools are under a constitutional duty to desegregate.

As charitable institutions, such schools are normally entitled to substantial financial benefits under State property-tax and income-tax provisions. In addition to financing these schools by tuition grants and by tax credits, some States have also extended their teacher retirement programs to include teachers employed by these private segregated schools, and supplied free text books to, and reimbursed the transportation expenses of, pupils attending such schools.

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[51] *Supra* pp. 146–47.

[52] The promotional brochure of the John T. Morgan Academy in Selma, Alabama, a racially segregated private school, prominently displays the following message:

> Giving Can be Generous, Yet Frugal
>
> Contributions by individuals or corporations to a qualified not-for-profit institution (such as the Dallas County Private School Foundation) are deductible up to 30% of the individual's Adjusted Gross Income and up to 5% of the corporation's net income.
>
> Unusual savings may be realized by contributing stocks, bonds, or other capital assets which have increased in value since acquired, instead of selling the securities and contributing the proceeds.

The Supreme Court has indicated that segregation in private institutions may come under a constitutional prohibition if "to some significant extent the State in any of its manifestations has been found to have become involved in it." [53] The three-judge district court which declared Alabama's tuition grant statute unconstitutional also warned that if the State's "involvement with the private school system continues to be 'significant', then this 'private' system will have become a state actor within the meaning of the Fourteenth amendment and will need to be brought under this Court's state-wide desegregation order." [54] The same obligation to desegregate may accrue under the Fifth amendment where the Federal Government's involvement is "significant". For reasons already set forth, there would appear to be considerable justification for the contention that the benefits afforded racially segregated private schools under the Internal Revenue Code amount to significant governmental involvement, particularly when considered in combination with other governmental benefits granted to such institutions.

PART IV

Basis for Distinguishing Social Clubs, Fraternal Organizations and Religious Institutions

It remains to provide some tentative answers to problems which the application of Title VI or equal protection principles to racially segregated private schools may be thought to raise. For example, would the duty to deny tax benefits to racially segregated private schools or the constitutional obligation of nondiscrimination which may rest on a private school receiving Federal tax benefits extend to social clubs and fraternal organizations which are now tax-exempt,[55] but which may exclude whites or Negroes or all but members of one minority or nationality group? If tax benefits to racially segregated private schools constitute a prohibited form of Federal financial assistance, do similar tax benefits allowed churches and other religious institutions, such as parochial schools,[56] constitute an establishment of religion prohibited by the establishment clause of the First amendment?

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[53] *Burton* v. *Wilmington Parking Authority, supra* note 50, at 722.

[54] *Lee* v. *Macon County Board of Education, supra* note 46, at 478. (Footnote omitted.) See also Klein, *Desegregation of Private Schools: Pursuit and Challenge*, 21 N.Y.U. Intra. L. Rev. 149 (1966); Jansen, *Private and State Action in School Segregation*, 11 Loyola L. Rev. 92 (1962); Van Alstyne and Karst, *State Action*, 14 Stan. L. Rev. 3 (1961); Miller, *Racial Discrimination and Private Education* (1957).

A. In a recent Supreme Court case, *Evans* v. *Newton*,[57] similar objections were raised when Mr. Justice Harlan and Mr. Justice Stewart dissented from an opinion applying the 14th amendment duty of nondiscrimination to a park placed in the hands of private trustees but which had collateral State ties and a "public character". In his opinion, Mr. Justice Harlan suggested that the principles applied in that case by the majority "might be spun out to reach privately owned orphanages, libraries, garbage collection agencies, and a host of other functions commonly regarded as nongovernmental. . . ." [58] In an opinion by Mr. Justice Douglas, the majority recognized that the case presented a conflict, which had to be reconciled, between equal protection rights and rights of privacy and association. To resolve the conflict, the court analyzed and balanced the competing claims:

> "Only by sifting facts and weighing circumstances" (*Burton* v. *Wilmington Parking Authority, supra* at 722) can we determine whether the reach of the Fourteenth Amendment extends to a particular case.[59]

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[55] Int. Rev. Code of 1954, §501(c) (7)-(8).

[56] Int. Rev. Code of 1954, §§170(c) and 501(c)(3).

[57] 382 U.S. 296 (1966).

[58] *Id.* at 322.

[59] *Id.* at 299–300. Professor Henkin has pointed out that such a balancing test is common in Supreme Court jurisprudence when property interests conflict with other civil liberties and civil rights. *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. Pa. L. Rev. 473 at 492–95 (1962). For example, Mr. Justice Black, speaking for the Court in *Marsh* v. *Alabama*, 326 U.S. 501, 509 (1946) stated: "When we balance the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position." See also *Thornhill* v. *Alabama*. 310 U.S. 88 (1940); *Schneider* v. *State*, 308 U.S. 147, 161–62 (1939); *Saia* v. *New York*, 334 U.S. 558, 562 (1948) (opinion of Mr. Justice Douglas, speaking for the Court). Such a balancing test when equal protection rights clash with other constitutionally guaranteed liberties has been advocated by a number of legal commentators. See Henkin, *supra;* Van Alstyne, *Mr. Justice Black, Constitutional Review, and the Talisman of State Action*, 1965 Duke L.J. 219 and articles cited therein; Williams, *The Twilight of State Action*, 41 Tex. L. Rev. 347 (1963); Van Alstyne and Karst, *State Action*, 14 Stanford L. Rev. 3 (1961); Horowitz, *The Misleading Search for 'State Action' Under the Fourteenth Amendment*, 30 So. Cal. L. Rev. 208 (1957).

Once collateral governmental involvement in ostensibly private segregation is established, the critical question becomes whether upon an examination of State involvement and the character of the discrimination, the private sponsors of the discrimination should be classified as "representatives of the state to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." [60]

This formulation of the constitutional standard answers the criticism of the *Evans* dissent by suggesting the possibility that the existence of collateral State involvement in private racial segregation may not always bring with it a duty to refrain from discrimination and by suggesting as well that two instances of private discrimination with an equivalent amount of State involvement may be resolved differently, depending upon the particular circumstances of each case. As the Court cautioned in *Burton*:

> . . . to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "this Court has never attempted."[61]

Because social clubs and fraternities are institutions in which rights of privacy and free association have traditionally been highly valued, they may enjoy a protected right to discriminate which must be preferred over the claim of equality, even if the discrimination is based upon race. The Court stated in *Evans:*

> There are two complementary principles to be reconciled in this case. One is the right of the individual to pick his own associates so as to express his preferences and dislikes, and to fashion his private life by joining such clubs and groups as he chooses. . . . A private golf club . . . restricted to either Negro or white membership is one expression of freedom of association.[62]

And, as one commentator has noted:

> In those cases where state involvement in discriminatory activity does not violate the equal protection clause, we suggest, there exist, against the claim of equality, important countervailing rights of liberty and privacy that enjoy substantial constitutional protection; these important rights include a protected freedom to discriminate which the Constitution prefers over the victim's claim to equality and which the state may be constitutionally permitted—if not required—to support by judicial remedy.[63]

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[60] *Nixon* v. *Condon,* 286 U.S. 73, 88–89 (1932). See especially the application of this standard in *Kerr* v. *Enoch Pratt Free Library,* 149 F.2d 212 (4th Cir.), *cert. denied,* 326 U.S. 721 (1945).

[61] 365 U.S. at 722 (Citation omitted.)

[62] 382 U.S. at 298–99.

[63] Henkin, note 59 *supra* at 487.

Educational institutions, on the other hand, whether public or "private", are not of a comparable character. Social clubs and fraternities partake of a more intimate character than private educational institutions. This is reflected in the fact that social clubs and fraternities do not commonly issue a general invitation to the public to participate. Private schools do, though they may impose standards which disqualify. The practices of social clubs, moreover, are not matters of high public concern. Precisely the opposite is true of the practices of educational institutions, public or private. In response to an argument that racial segregation in a privately managed educational institution is a matter of private concern alone, one distinguished jurist replied:

> In a country dedicated to the creed that education is the only "sure foundation*** of freedom," "without which no republic can maintain itself in strength," institutions of learning are not things of purely private concern. The Supreme Court of the United States has noted that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown* v. *Board of Education of Topeka, supra,* 347 U.S. 493. . . . And, with less restraint, the Louisiana Supreme Court has said: "Education insures domestic tranquility, provides for the common defense, promotes the general welfare, and it secures the blessings of liberty to ourselves and our posterity." No one any longer doubts that education is a matter affected with the greatest public interest. And this is true whether it is offered by a public or private institution.[64]

The public consequences of excluding Negroes from private schools—including the effects of such exclusion on public school education generally and on the public school education of Negroes in particular—are so great as to preclude the conclusion that the right to engage in such discrimination, if one exists, must prevail over the countervailing claim of Negroes to equal protection of the laws.

B. Nor does it follow, from the conclusion that IRS is under a duty to withhold tax benefits from racially segregated private schools, that tax benefits to parochial schools and churches are unconstitutional under the establishment clause of the First amendment, or that such institutions must accommodate all applicants, irrespective of their religion, while receiving such benefits. The Constitution permits government indirectly to support church-oriented education for the secular benefits it provides, regardless of the incidental religious effects.[65] Moreover, exclusion of nonmembers from full participation in religiously oriented institutions, including schools, may be protected by the First amendment right of religious liberty.[66] Members of the Supreme Court have indicated that they do not question the propriety of tax benefits for churches and religious institutions as part of a general scheme granting benefits to charities and educational institutions provided the benefits are available to nontheistic as well as theistic groups on an equal basis.[67]

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[64] *Guillory* v. *Adm'rs. of Tulane University,* 203 F.Supp. 855, 858–59 (E.D. La. 1962) (J. Skelly Wright, District Judge) (dictum) (Footnotes and citations omitted.) For the later history of this case, see note 9 *supra.*

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[65] *Everson* v. *Board of Education,* 330 U.S. 1 (1947). See also, *McGowan* v. *Maryland,* 366 U.S. 420 (1961).

[66] Cf. *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). In his concurring opinion in *Abington School District* v. *Schempp,* 374 U.S. 203, 242 (1963), Mr. Justice Brennan said: "In my judgment the First Amendment forbids the State to inhibit that freedom of choice [to choose some form of private, sectarian education as against public education] by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures."

[67] In *Engel* v. *Vitale,* 370 U.S. 421 (1962), Mr. Justice Douglas in a concurring opinion expressed the view that any financial support of religious institutions, including tax benefits, is unconstitutional, 379 U.S. at 437–44. The other justices, however, declined to join in his opinion. Mr. Justice Brennan, in *Abington School District* v. *Schempp, supra* at 301–02, pointed out that:

> Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups. There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God.

The Court of Appeals of Maryland recently upheld the state property tax exemption of church buildings and parsonages against a challenge based upon the First amendment of the U.S. Constitution and the Maryland Constitution; the United States Superior Court declined to review the case. *Murray* v. *Comptroller of Treasury,* 241 Md. 383, 216 A.2d 897 (1966), *cert. denied,* 385 U.S. 816 (1966).

APPENDIX IX

HEW ENFORCEMENT PROCEEDINGS BROUGHT UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 AGAINST SCHOOL DISTRICTS IN SEVENTEEN SOUTHERN AND BORDER STATES[1]

State	*Total Number of Enforcement Proceedings Since Sept.* 15, 1965	*Enforcement Proceedings Brought Within The* 1966–67 *School Year*[2]
Alabama	*72*	*46*
Arkansas	*24*	*9*
Delaware	*0*	*0*
Florida	*2*	*2*
Georgia	*47*	*36*
Kentucky	*0*	*0*
Louisiana	*36*	*2*
Maryland	*0*	*0*
Mississippi	*81*	*46*
Missouri	*0*	*0*
North Carolina	*16*	*16*
Oklahoma	*3*	*0*
South Carolina	*23*	*16*
Tennessee	*7*	*7*
Texas	*2*	*2*
Virginia	*10*	*10*
West Virginia	*0*	*0*
Total	*323*	*192*

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[1] The figures in this table have been calculated from the Status Report of Civil Rights Compliance Proceedings prepared by the Civil Rights Hearing Unit of the Office of the General Counsel, Department of Health, Education, and Welfare, and from other information obtained orally from the Unit. The table includes citations of school districts for failure to submit acceptable assurances as well as citations for taking inadequate steps to desegregate. Enforcement proceedings involving special schools, such as reformatory schools and schools for the deaf and dumb, have not been included. The table includes all citations served upon school boards from the beginning of the enforcement program on September 15, 1965, up to and including July 24, 1967.

HEW has cut off Federal funds from ninety-one school districts. Twenty-eight of these districts are now in compliance, eighteen of them because the districts involved were placed for the first time under court order.

[2] This column includes all citations served upon school boards between Sept. 1, 1966, and June 30, 1967.

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